

(23,429)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 854.

**LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED, PLAINTIFF
IN ERROR,**

vs.

**THE DELAWARE, LACKAWANNA AND WESTERN RAIL-
ROAD COMPANY.**

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit,
October Sess., 1910.

No. 1432.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,

VS.

LIZZIE M. TROXELL, Defendant-in-Error.

In Error to the Circuit Court of the United States for the Eastern
District of Pennsylvania.

1 April Session, 1909.

George Demming.
James F. Campbell.

694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

2 *Docket Entries.*

1909 September	3	Præcipe for Summons filed. Summons exit returnable the first Monday of September next. Statement of Claim filed. Rule to Plead filed.
" "	6	Summons returned "served" and filed.
" "	18	Order for the appearance of James F. Camp- bell, Esq., for defendant filed. Plea filed. Order to place case on trial list filed.
1910 April	4	And now, to wit, a jury being called comes to wit (see minutes).
" "	5	And the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find for plaintiff and assess the dam- ages at Seven thousand six hundred and ninety-eight (\$7,698.00) Dollars.
" "	8	Plaintiff's bill of costs filed.
" "	9	Defendant's witness bill filed. Motion for judgment non obstante veredicto filed. Motion and reasons for new trial filed.

- | | | | |
|---|--------|----|--|
| " | " | 11 | Additional motion and reasons for new trial filed. |
| " | June | 3 | Argued. |
| " | August | 6 | Opinion, Holland, J., overruling motion for new trial and refusing motion for judgment non obstante veredicto filed. |
| " | " | 8 | Order granting exception to refusal of defendant's motion for judgment non obstante veredicto filed.
Præcipe for judgment. Judgment accordingly. |
| " | " | 16 | Bill of exceptions filed. |
| " | " | 16 | Assignments of error filed.
Petition for writ of error filed. |
| " | " | 16 | Order allowing writ of error filed.
Bond sur writ of error filed.
Order approving bond sur writ of error filed.
Writ of error allowed and issued and copy lodged in Clerk's office for adverse party.
Citation allowed and issued.
Citation returned "service accepted" and filed.
Præcipe sur transcript of record filed. |

UNITED STATES OF AMERICA, vs:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

3 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Lizzie M. Troxell, Plaintiff, and The Delaware, Lackawanna and Western Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said The Delaware, Lackawanna and Western Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, at Philadelphia, the 16th day

of August, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before Holland, J.

Allowed:

By THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

4

Citation.

UNITED STATES OF AMERICA, vs:

The President of the United States to Lizzie M. Troxell, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein The Delaware, Lackawanna and Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Holland, Judge, holding Circuit Court of the United States this 16th day of August, in the year of our Lord one thousand nine hundred and ten.

By THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Service accepted.

GEORGE DEMMING,
Attorney for Defendant in Error.

5 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL, a Citizen and Resident of the State of New Jersey,

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
a Corporation of the State of Pennsylvania.

Plaintiff's Statement of Claim.

Filed Sept. 3, 1909.

The plaintiff, Lizzie M. Troxell, a citizen of the State of New Jersey, claims of the defendant, The Delaware, Lackawanna and Western Railroad Company, a corporation incorporated under Special Acts of the Legislature of the State of Pennsylvania, the sum of Fifty Thousand Dollars (\$50,000.00) as damages, which sum is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement.

The plaintiff, Lizzie M. Troxell, is the surviving widow of Joseph Daniel Troxell, and has by him living two children, Willard Daniel Troxell, three years of age, and Vera Louisa Troxell, nine months of age.

The defendant, The Delaware, Lackawanna and Western Railroad Company, is a common carrier corporation, engaged in the business of transportation, both of freight and passengers, and of Interstate and Foreign Commerce, and is incorporated for this purpose under Special Acts of the Legislature of the State of Pennsylvania.

6 On or about the 21st day of July, 1909, said Joseph Daniel Troxell, the husband of said plaintiff, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying Interstate and Foreign Commerce and Traffic, and on and about the cars, tracks, roadbed and right of way used and employed by said defendant in its Interstate and Foreign Commerce and Traffic, on and about the Bangor and Portland Railroad Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.

While said Joseph Daniel Troxell, on and about said date, was employed in the proper, careful and necessary performance of his duties as fireman of the locomotive of said train, without any negligence or carelessness whatsoever on his part, and due entirely to the negligence, carelessness and oversight of said defendant, and its failure to supply and keep in good, efficient condition, proper, necessary and safe devices, instruments and apparatus, said locomotive and train came into violent collision with several loose and runaway cars,

causing a wreck, whereby and wherein said Joseph Daniel Troxell lost his life.

By reason of the death and killing of said Joseph Daniel Troxell, said plaintiff and her children are deprived of the fellowship and companionship of her husband, are robbed and deprived of his support and maintenance for all time to time, put to great loss for funeral expenses and otherwise, thrown absolutely on her own resources and efforts for a livelihood for herself and her children, and altogether damaged in the sum of Fifty Thousand Dollars (\$50,000.00) as above set out.

Wherefore plaintiff brings this suit.

GEORGE DEMMING,
Attorney pro Plaintiff.

7 STATE OF PENNSYLVANIA,
County of Northampton, ss:

Lizzie M. Troxell, being duly sworn according to law, deposes and says that she is the plaintiff in the foregoing suit, and that the facts contained in the above statement of claim are just and true, to the best of her knowledge, information and belief.

LIZZIE MINERVA TROXELL.

Sworn and subscribed to before me the 2nd day of September, 1909.

[SEAL.]

EVAN B. LEWIS,
Notary Public.

Commission expires January 22, 1913.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Plea.

Filed Sept. 18, 1909.

Defendant pleads not guilty.

JAMES F. CAMPBELL,
Attorney for Defendant.

September 18, 1909.

Jury.

And afterwards, to wit, on the 4th day of April, 1910, a jury being called, comes to wit:

Chas. Breneiser, Jr.
P. J. O'Donnell
Sellers Hoffman
M. R. Heller
H. A. Groff
P. W. Baker

Henry Strathman
S. P. Wagner
C. G. Garber
R. W. Gangewere
A. F. Peters
Samuel Neely

who are duly sworn or affirmed to well and truly try the issue joined.

Verdict.

And afterwards, to wit, on the 5th day of April, 1910, the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find for plaintiff and assess the damages at Seven thousand six hundred and ninety-eight (\$7,698.00) Dollars.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Be it remembered, that in the said term of April, A. D. 1909, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the 4th and 5th days of April, A. D. 1910, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said Lizzie M. Troxell called the following named witnesses, and produced the following evidence (prout evidence offered by plaintiff, as shown by the stenographer's transcript filed herewith); and thereupon the de-

defendant offered the following evidence (prout evidence for the defendant as shown by the stenographer's transcript filed herewith); which was all of the evidence presented by both sides, and thereupon the Court charged the jury as follows: (prout charge of the Court, as shown by the stenographer's transcript filed herewith and approved by the Court).

10 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Before Hon. James B. Holland, J., and a Jury.

Present:

MONDAY, April 4, 1910.

George Demming, Esq., for plaintiff.
James F. Campbell, Esq., and
J. H. Oliver, Esq., for defendant.

Jury Sworn April 4, 1910.

Plaintiff's Evidence.

LIZZIE MINERVA TROXELL, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. 480 South Main Street, Phillipsburg, New Jersey.

Q. Was Joseph Daniel Troxell your husband?

A. Yes, sir.

Q. When were you married?

A. The twelfth day of August, 1905.

11 Q. Have you your marriage certificate with you?

A. Yes, sir.

Q. Please produce it.

(Marriage certificate produced.)

Mr. CAMPBELL: We will admit the marriage.

By Mr. DEMMING:

Q. How many children had you by your husband?

A. Two.

Q. Give us their names and their ages?

A. Willard Troxell and Vera Troxell.

- Q. One is a boy and the other is a girl?
- A. Yes, sir.
- Q. How old is the boy?
- A. The boy was four years old on the 17th of March.
- Q. How old is the girl?
- A. The girl will be two on the 6th of November.
- Q. These are the children here, are they?
- A. Yes, sir.
- Q. Do you know when your husband first got employment with the Delaware, Lackawanna and Western Railroad Co.—when he first went to work for them?
- A. No, sir.
- Q. Was it after you were married or before?
- A. It was after we were married.
- Q. You were married in 1905, you say?
- A. Yes, sir.
- Q. Did he work then continuously for that railroad after he got employment with them?
- A. No, sir.
- Q. Come down to the nineteenth of July, 1909, last year. Who was your husband working for then?
- A. For the D. L. & W. Company.
- Q. The Delaware, Lackawanna and Western Railroad Company?
- A. Yes, sir.
- Q. On the day of the accident, the 21st day of July, he was working for the same company?
- 12 A. Yes, sir.
- Q. What was his business?
- A. Fireman.
- Q. Fireman on an engine?
- A. Yes, sir.
- Q. Was it a freight train or a passenger train?
- A. Freight train.
- Q. Known as a day freight, was it? Was it a day freight train?
- A. Yes, sir.
- Q. What time would he leave in the morning to go to his work?
- A. About six o'clock.
- Q. Left the house about six o'clock.
- A. Yes, sir.
- Q. Do you remember the day of the accident, the twenty-first of July? What day was it—the twenty-first of July, 1909?
- A. The twenty-first of July.
- Q. What time did he leave that morning?
- A. That morning he left at six o'clock.
- Q. When did you hear about the accident?
- A. Around ten o'clock in the morning.
- Q. In what way did you know about it?
- A. My mother-in-law came down and told me.
- Q. Did you know your husband was dead at that time?
- A. I didn't know he was dead. I didn't know what had happened at all.

Q. When was his body brought home?

A. Five o'clock in the evening.

Q. That same day?

A. Yes, sir.

Q. What is your age? How old are you?

A. I was twenty-two on the second of April of this year.

Q. Do you know how old your husband was?

13 A. He would have been twenty-three on the sixth of September.

Q. Of last year?

A. Yes, sir.

Q. He was not quite twenty-three at the time of the accident? Is that right?

A. Not quite twenty-three, no, sir.

Q. What was the condition of your husband's health? What sort of a man was he, so far as his health was concerned?

Mr. CAMPBELL: I object to that. She is not an expert witness. It is a mere matter of opinion.

The COURT: She can tell whether he was sick or well.

(Objection overruled.)

A. He was always a healthy man. He was always healthy. He never complained.

By Mr. DEMMING:

Q. Did he lose any work at all by reason of ill health?

A. Only once, when he had his shoulder strained, for a couple of days.

Q. He got that in the course of his work, did he?

A. Yes, sir.

Q. How much did your husband earn a month?

Mr. CAMPBELL: I object to that. This witness is not competent to testify to what Mr. Troxell said he earned. If he was working for the defendant company, that matter could be proved very readily. Anything that Mr. Troxell told his wife as to what he earned certainly would not be relevant. If she actually knows of her own knowledge what he earned, I have no objection at all to her testifying.

By Mr. DEMMING:

Q. I am only asking you what you yourself know.

14 By the COURT:

Q. Do you know what he earned, except what he told you?

A. From seventy-five to a hundred dollars a month.

Q. Do you know except that he told you? You do not know, only that he told you what he earned, do you?

By Mr. CAMPBELL:

Q. You know what money he gave you, don't you?

A. Yes, sir.

(Objection sustained.)

Mr. CAMPBELL: I ask that the answer that the witness gave be stricken out.

(Motion sustained.)

By Mr. DEMMING:

Q. You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

Mr. CAMPBELL: I still object, for the reason that the proper way to prove that is to call for the checks.

(Objection overruled.)

15 (Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. Eighty-five dollars.

Q. What were the funeral expenses?

A. One hundred and ninety-eight dollars and twenty-eight cents.

Q. That is a bill which you owe?

A. Yes, sir.

Q. Who was the undertaker? Do you know his name?

A. Mr. Roehm, in Nazareth.

Q. At that time you lived in Nazareth?

A. Yes, sir.

Q. Since the accident have you been supporting yourself?

A. Yes, sir.

Q. How.

A. By working out.

Q. Where do you work?

A. I worked in a mill for a while and I got sick and couldn't stand it, and then I worked in a boarding house.

Q. In Phillipsburg?

A. Yes, sir.

Q. Are you able to support the children and yourself?

A. I was sick for three weeks when I couldn't earn anything.

Q. Who keeps the children for you?

16 A. I was paying to keep them as good as I could until I took sick.

Q. Where are they now?

A. My mother has one and my cousin has the other.

Q. That is because you are unable to make enough money to keep them?

A. Yes, sir.

Q. Have you a picture of your late husband?

A. Yes, sir.

(Picture produced.)

Q. This is his picture, is it?

A. Yes, sir.

(Mr. Demming exhibited the picture to the jury.)

Q. Was he a large man or a small man?

A. He was a pretty tall man.

Q. Do you know how much he weighed? Was he a heavy man?

A. The last time I knew he weighed himself he weighed 148 pounds.

Cross-examination.

By Mr. CAMPBELL:

Q. He showed you these wage checks every time he came home with them, every time he got them from the Company?

A. Most every time.

Q. They were all between seventy-five and a hundred dollars, were they?

A. Yes, sir.

Q. How often did he get them?

A. Once a month.

Q. Was he laid off at any time by the Lackawanna Railroad Company on account of lack of work?

A. Sometimes they were.

17 Q. Would he still then get a check of seventy-five or a hundred dollars a month?

A. No; not when they didn't have the work.

Q. Then, do I understand that some of the checks that he got were for less than seventy-five dollars, or were they less than a hundred?

A. That was just according to how much work they had.

Q. Were the checks for less than seventy-five dollars?

A. Not that I know of.

Q. You are sure they averaged all the time about eighty-five dollars? That is what you have testified to. Is that right?

A. Yes, sir.

Q. When did he first go to work for the Lackawanna Railroad Company—how long after you were married?

A. It was only a couple of months after we were married.

Q. Do you know what he was doing at that time?

A. Brakeman.

Q. On this same division of the Lackawanna Railroad?

A. Yes, sir.

Q. Do you know what his run was, where he went?

A. From Nazareth to Bangor.

Q. That would take him by Pen Argyl, would it?

A. Yes, sir.

Q. Where do you live now?

A. 480 South Main Street, Phillipsburg, New Jersey.

Q. When did you move there?

A. I was there since the first of August.

Q. Since the first of August of this last year?

A. Yes, sir.

Q. Is that the first time you were there?

A. No, sir. I had been there before.

18 Q. Where did you live at the time of your husband's death?

A. At the time he was killed?

Q. Yes.

A. In Nazareth.

Q. Had he always lived at Nazareth?

A. My husband did.

Q. Had he ever lived at Phillipsburg?

A. No, sir.

Q. So that, when you were married you came over to Nazareth to live?

A. Yes, sir.

Q. Where did you live before you were married?

A. In Nazareth.

Q. Didn't you use to live at Bethlehem?

A. I used to be there, but I was in Nazareth for two years before we were married.

Q. When did you first move to Phillipsburg after the death of your husband?

A. I was down the last week in July, and then I went over to stay there the first week in August.

Q. You stayed there until the first week in August?

A. Yes, sir.

Q. Then where did you go from there?

A. I was still there.

Q. How long did you stay there? How long did you stay at Phillipsburg then?

A. How long will I stay there? I intend to make my home there.

Q. Didn't you move back to Bethlehem since?

A. No, sir.

Q. You still live in Phillipsburg?

A. Yes, sir.

By the COURT:

Q. Where is your mother living?

A. My mother lives in Bethlehem.

Q. Where is your cousin living?

19 A. At Stroudsburg.

Q. Have you any relations over in Phillipsburg?

A. No, sir.

Q. How did you come to go over there?

A. I always said if I could get a chance to make my home there, I would do so. I always like the place, and of course that was the first place I went for work.

By Mr. DEMMING:

Q. Was that the only place you could get work?

A. It wasn't the only place, but it was the place I wanted to be.

Q. How much are you able to earn there?

A. I earn three dollars a week and my board.

JAMES H. TROXELL, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. In Nazareth, Pennsylvania.

Q. You are the father of this boy that was killed?

A. Yes, sir.

Q. How old was he at the time of his death?

A. Twenty-two years, ten months and some days. I don't know exactly the days. About fourteen.

Q. When would he have been twenty-three?

A. On the seventh day of September, this last September.

Q. 1909?

A. Yes, sir.

Q. You knew he was employed by the Delaware, Lackawanna and Western Railroad Company as a fireman?

A. Yes, sir.

Q. Tell the Court and jury what was the condition of that boy's health?

20 A. He was a hardy, healthy man. I don't know that he ever was sick. I don't remember.

Q. Was he tall?

A. He was about two inches taller than I am.

Q. How tall are you?

A. I think I am five feet nine inches.

Q. How much did he weigh?

A. That is hard for me to tell. I don't know exactly. He might have weighed 160—somewhere around there. I don't know.

Q. He was a well-built man, was he?

A. Yes, sir.

Q. Did you ever know of him laying off any days at all on account of illness, laying off from his work?

- A. I don't remember that.
Q. Do you mean you don't remember, or that he did not?
A. I don't think that he had to lay off.
Q. You do not recall any time that he did do it?
A. Not that I know of, no, sir.

Cross-examination.

By Mr. CAMPBELL:

- Q. Where did your son live at the time of his death?
A. On South Street, Nazareth.
Q. Had he ever lived at Phillipsburg?
A. No, sir.
Q. Was his wife living with him at the time of his death?
A. Yes, sir.
Q. Did your son always live in Nazareth after he was married?
A. Yes, sir.

21 HENRY BUSS, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

- Q. Where do you live?
A. Nazareth, Pennsylvania.
Q. What is your business?
A. Locomotive engineer.
Q. For what railroad?
A. The B. and P. Division of the D. L. & W.
Q. That is the Bangor and Portland Division?
A. Yes, sir.
Q. How long have you worked for them?
A. Since 1903.
Q. You were the engineer of the engine on this freight train that Mr. Troxell, the dead man, worked on, were you not?
A. Yes, sir.
Q. How long had he been firing for you?
A. As near as I can get at it, somewhere around a year.
Q. What sort of a fireman was he?
A. A good worker, a good fireman.
Q. You had had other firemen besides him?
A. A number of them.
Q. As compared with them, what sort of a fireman was he—as good as any of them?
A. Who, Troxell?
Q. Yes.
A. A good, able-bodied fireman; yes, sir.
Q. Do you know of any time that he ever had to lay off on account of ill health?
A. Not that I recollect.
Q. He worked steadily, did he?
A. Yes, sir.

Q. You remember the morning of this accident, don't you, the twenty-first of July, 1909?

A. Yes, sir.

22 Q. What time did you leave Nazareth that morning?

A. I did not look at the time, but they told me 7:15. I don't keep track of the leaving time—not very often.

Q. Was Troxell on the engine as fireman that morning?

A. Yes, sir.

Q. In his accustomed place?

A. Yes.

Q. Just tell the jury in your own way what happened, so far as you remember, so far as you could see at the time?

A. A runaway car struck us and turned the engine over, and Troxell went under it and got killed.

Q. Where was this where it happened?

A. About a mile east of Belfast Junction. Nearly a mile.

Q. What part of the road was it on, a straight road or a curve?

A. A curve.

Q. A sharp curve?

A. Well, a pretty sharp curve, yes.

Q. What was the first knowledge that you had that anything was going to happen?

A. I didn't have any until I saw the cars coming.

Q. How far away were they when you first saw them?

A. Between two and three hundred feet.

Q. Coming towards you?

A. Yes, sir.

Q. How fast were they going, as near as you can tell?

A. I should judge between forty-five and fifty miles an hour, as near as I could guess.

Q. How fast were you going yourself, your own train?

A. We were only going four or five miles an hour—maybe six. We just started away.

23 Q. What did you do?

A. I got out. I don't know what I did afterwards.

Q. Do you mean you jumped from the engine?

A. I got out on the step. I don't know whether it was the step or on the ground. I didn't jump, but I went out in front. It was either on the step or on the ground—I couldn't tell.

Q. Which side of the engine were you on?

A. On the right side.

Q. Where was Troxell at that time?

A. In the tank, where his work was.

Q. Did he have any warning at all?

A. No; not any more than I did. I don't suppose he knew anything of it.

Q. Did you see him after they got him out of the wreck?

A. Yes.

Q. Was he dead at that time?

A. Yes. He was dead.

Q. How long was it after the occurrence happened that they got him out?

A. About two hours and a half, I think.

Q. Was he buried under the engine?

A. Under the tank. Not under the engine. Under the tank.

Q. It is a down grade, is it, from Pen Argyl to the point of the accident?

A. No. Not all the way. There is about half a mile up grade, from where we were struck—a slight up grade.

Q. These cars had run on that grade, though? There was no engine attached to the runaway cars?

A. No. Not when I saw them.

Q. When they collided with you, there was no engine?

A. No. There was none then.

Q. They were running by themselves?

A. Yes, sir.

24. By the COURT:

Q. Running up grade?

A. They had about four miles and a half down grade, and then they had a light up grade, where we got struck.

By Mr. DEMMING:

Q. A light up grade?

A. About half a mile. But they had a good long down grade.

Q. At all events, they were running forty-five or fifty miles an hour?

A. To my best knowledge, yes.

Q. Did you know that Troxell was preparing to take the examination for an engineer?

Mr. CAMPBELL: I object to this. This is an action by the widow to recover compensation.

Mr. DEMMING: It is perfectly proper, in a case like this, in showing the abilities of a dead man, to show his chances——

The COURT: You cannot recover on what he is going to earn; it is what he is earning now. The fact that he may become an engineer the next day does not alter the case.

Mr. DEMMING: Does not your Honor think that the man's chances for a promotion and the consequent increased earnings that he might have had, is an element in a case like this, where the widow is suing for the loss of her husband?

The COURT: The decisions are all the other way.

(Objection sustained.)

(Exception noted for plaintiff by direction of Court.)

25 Cross-examination.

By Mr. CAMPBELL:

Q. Had you seen those cars before?

A. Before the day of the accident?

Q. Yes.

A. Yes, sir.

Q. Where had you see them?

A. At Pen Argyl.

Q. Whereabouts at Pen Argyl?

Mr. DEMMING: Does your Honor think this is cross-examination?

Mr. CAMPBELL: If your Honor please, Mr. Demming brought in chief about a certain lot of cars that ran into this witness' locomotive. Now I ask him if he had ever seen those cars before. It seems to me that inasmuch as he brought the cars in I can trace those cars right back and get their whole history. I think it is proper cross-examination.

Mr. DEMMING: He is attempting now to use this witness as his own witness. He can only cross-examine the witness as to the questions asked the witness in chief. As to that I have no objection.

Mr. CAMPBELL: This witness has testified that he saw cars coming at forty or fifty miles an hour, which ran into his locomotive. While this witness is on the stand I certainly have a right to go into the history of these cars and see what he knows about them, whether the speed was less, and things of that kind.

The COURT: That is not germane to the examination-in-chief. If you could do that, if he has to call all of your people you could bring out your whole case.

Mr. CAMPBELL: He has testified about cars running into
26 his engine. Can't I ask where he saw those cars before?

Suppose Troxell knew those cars were coming, I could bring that out by Troxell on cross-examination.

The COURT: If he knew they were coming, yes.

Mr. DEMMING: I am perfectly willing to have you ask him if he knew they were coming.

The COURT: I will let you ask that question, whether he saw those cars before.

By Mr. CAMPBELL:

Q. Where did you see those cars before?

A. At Pen Argyl.

Q. When?

A. On the nineteenth.

By Mr. DEMMING:

Q. That is, two days before the accident?

A. Yes, sir; the nineteenth of July.

Q. The accident happened on Wednesday, and that would have been on Monday, therefore, when you saw the cars?

A. Yes, sir.

By Mr. CAMPBELL:

Q. How did you come to see those cars on that day?

A. We had a derail of one car, and we placed those cars at Albion No. 2 switch. We ran those cars in there on the nineteenth.

Q. Was Troxell with you?

A. Yes, sir.

Q. Who put those cars in—you or Troxell?

A. Troxell.

By the COURT:

Q. Was he running the engine?

A. I let him run the engine. When we have a job like that, oftentimes I let the fireman take a hold.

27 Mr. DEMMING: Your Honor will grant me an exception to the admission of all this testimony?

The COURT: This testimony will not be stricken out, but we will not go any further on this line.

QUINTUS RUCH, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Bangor, Pennsylvania.

Q. Your business is what?

A. Conductor.

Q. For what railroad company?

A. The Delaware, Lackawanna and Western, the B. and P. Division.

Q. That is the Bangor and Portland Division?

A. Yes, sir.

Q. How is your crew known? Are you the conductor of the yard crew?

A. Yes, sir.

Q. At Pen Argyl?

A. Pen Argyl, yes, sir.

Q. Your crew does the drilling and shifting of cars around the yards at Pen Argyl?

A. Yes, sir.

Q. Do you remember the twenty-first day of July of last year?

A. Yes, sir.

Q. What was the first you knew about cars having run away from a siding in your yard?

A. The dispatcher told me on arriving at West Bangor Junction, on the telephone. He called me on the telephone.

Q. Where was your crew at that time?

A. Right there with me.

Q. What part of the yard were you?

28 A. A place called West Bangor Junction.

Q. You were not in the Pen Argyl yard?

A. The Pen Argyl district. It was at a place they call the Pen Argyl Junction. It is in the Pen Argyl district.

Q. How far were you away from this number two siding, where these cars had been stationed?

A. Probably a quarter of a mile.

By the COURT:

Q. How far?

A. Probably a quarter of a mile.

Q. Weren't you the conductor of this crew in which Troxell was working?

A. No, sir.

Mr. DEMMING: That was another crew. This was the yard crew, and Troxell's crew was the regular freight crew. Troxell's crew ran from Nazareth to Bangor, and this witness' crew was just simply about the yard there at Pen Argyl and Bangor. Is that right?

The WITNESS: That is right.

By Mr. DEMMING:

Q. Just tell us, so that we can get this thing straight and have a fair understanding of conditions there, what there is in that yard. That is right in the midst of the slate region, is it not?

A. Yes, sir. You mean in regard to what?

Q. I mean in regard to all the conditions, so that we can have sort of a mental picture of what the condition of affairs is up there. We want to understand just those conditions. Pen Argyl is situated in the midst of the slate region?

A. Yes, sir.

Q. In northeastern Pennsylvania?

A. In northeastern Pennsylvania.

Q. Slate quarries are located alongside of the tracks all around there, are they not?

29 A. Yes, sir.

Q. At all those slate quarries there are very large and very high dumps of refuse slate?

A. Yes, sir.

Q. You say you were a quarter of a mile from the scene of where these cars came from on the morning of the accident?

A. Yes, sir.

Q. From where you were located could you see that siding?

A. No, sir.

Q. What interfered?

A. The hill.

Q. Do you mean one of the dumps?

A. One of the dumps.

Q. Those dumps of slate are practically around there in all directions, are they not?

A. Yes, sir.

Q. And they are very, very high, higher than this building?

A. Well, no. I don't think they are.

Q. They are very high?

A. Very high.

Q. When you got this telephone message did you recognize what cars these were that had run away?

A. He told me those ash cars ran away out of that particular switch, and that is all I knew.

Q. Did you recognize them by that description? Did you recognize what cars they were by that description?

A. Yes, sir; I did.

Q. They were the only cars loaded with ashes around there, were they?

A. Yes, sir.

Q. Where had you seen those cars before that?

A. In the same siding.

Q. What siding? Just tell us.

A. The Albion No. 2.

30 Q. That is the name of the siding that they came from?

A. Yes, sir.

Q. Just tell us where that siding runs from and what it connects with?

A. It connects with the Pen Argyl branch, leading into Pen Argyl.

Q. What does the Pen Argyl branch connect with?

A. The main line leading from Portland to Nazareth.

Q. The main line is the line used by the regular trains?

A. Yes, sir.

Q. And the Pen Argyl branch is the branch used by trains when they go from the main line up to Pen Argyl?

A. Yes, sir.

Q. And it is on the road up to Pen Argyl, as I understand it, that this siding breaks off from that branch?

A. Yes, sir.

Q. Can you draw a sketch of that?

A. Not very handy, no.

Q. I will draw it and let you see whether it is right. (Sketch shown witness.) This is a little rough, but I want, as far as possible, his Honor and the jury to understand this. Is that correct? Does that represent the main line?

A. Yes, sir.

Q. Does that represent the Pen Argyl branch, running up that way, and then up here somewhere is this Albion Siding No. 2?

A. On that branch, yes, sir.

Q. Where is Albion Siding No. 1?

A. Leading down below here somewhere, east of Pen Argyl Junction.

Q. Pen Argyl is up here, is it?

A. Yes, sir; up in there.

31 Q. How far do you think Pen Argyl is from where the branch leaves the main line?

A. Really, I don't know.

Q. Do you think about a mile?

A. No, sir; it is not that far.

Q. Half a mile.

A. Something on that order.

Q. Right alongside of Albion Siding No. 2, what is there there?

A. There is brush.

Q. Is there a slate quarry here?

A. No, sir.

Q. Where is that slate quarry?

A. The slate quarry is up in behind here.

- Q. The siding runs part way around the dump, does it not?
A. It don't run around the dump at all.
Q. Here is the dump right here, isn't it?
A. No, sir. I couldn't tell there at all. The Albion quarry lays right back of the Albion switch.
Q. There is a quarry here, is there not?
A. There is a quarry right there, yes, sir.
Q. And there is another quarry here? Is that right?
A. No, sir. Parsons' quarry lies in here.
Q. There is another quarry over here, is there not?
A. That is away beyond.
Q. There is a big dump that you can see, is there not?
A. That is the Albion quarry that you have reference to.
Q. Albion Siding No. 2 is used for cars for that quarry, is it not?
A. Yes, sir.
Q. Then, it is not very far from that siding, is it?
A. Not very, no, sir.
Q. There is a very large dump right here, is there not?
32 A. Yes. That is the Parsons quarry.
Q. That is, right here, about where Pen Argyl branch leaves the main line, there is a very big hole in the ground, which is a quarry, too, is there not?
A. Yes, sir.
Q. Pen Argyl is up in here?
A. Yes, sir.
Q. That is the Pen Argyl branch leaving there?
A. Yes, sir.
Q. This is Albion Siding No. 2—is that correct—and this is the main line here?
A. No. The siding goes clear up around the curve.
Q. Will you indicate where Albion Siding No. 2 is, then?
A. Albion Siding runs in from Pen Argyl Junction.
Q. Albion Siding No. 2 is where the cars came from, and this is Albion Siding No. 1?
A. Yes, sir.
Q. Here is where the quarry is up at the foot of Albion Siding No. 2?
A. Yes, sir.
Q. And here is the quarry alongside of the track?
A. Yes, sir.
Q. And here is a quarry down here, Albion No. 1?
A. Yes, sir. That is Albion quarry.
Q. That is correct, is it?
A. Yes, sir.
Q. Which direction is Nazareth? Is it that way? That is Pen Argyl running up there?
A. Yes. Nazareth lies in this direction.
Q. And Bangor is that direction?
A. Yes, sir.
Q. Those cars ran away towards Nazareth or Bangor?
A. Nazareth.

33 Mr. CAMPBELL: I move to strike out this testimony, because it is padding the record with a lot of absolutely unintelligible testimony. It is absolutely unintelligible in the record.

Mr. DEMMING: This rough sketch can be put in evidence. Your Honor certainly sees that without such a sketch it would be almost impossible for any of us to understand really what the witness was talking about.

Mr. CAMPBELL: It would have been very easy for an engineer to make an accurate plan.

Mr. DEMMING: The defendant has its own engineer, and they could have had a plan here. This is just a general sketch of the immediate vicinity of where these cars started from. That is the purpose of it.

Mr. CAMPBELL: There is a lot of testimony that is absolutely unintelligible. It might be important and it might not.

The COURT: It does not mean anything unless it is connected.

By Mr. DEMMING:

Q. When had you seen those cars before?

A. On the twentieth.

Q. We are bearing in mind that you are the conductor of the yard crew at Pen Argyl?

A. Yes, sir.

Q. Troxell had nothing to do with your crew, had he?

A. No, sir.

Q. Who was the fireman in your crew?

A. A fellow by the name of Van Gorden.

By the COURT:

Q. Were those cars in the yard?

A. In the yard, yes, sir.

By Mr. DEMMING:

34 Q. Where were these cars when you had seen them last?
A. In Albion 2.

Q. On Albion Siding No. 2?

A. Yes, sir.

Q. That is the siding that you say runs off the Pen Argyl branch?

A. Yes, sir.

Q. Some distance up from the main line?

A. Yes, sir.

By the COURT:

Q. What direction does that branch run from Pen Argyl?

A. It runs northeast as near as I can get at it.

Q. On which side is this switch where the cars were?

A. It is on the east side of it.

Q. Which way is it thrown off from the main track?

A. From the Pen Argyl branch?

Q. Yes. To the west.

A. Yes, sir.

Q. Then, coming from the northeast you run on to that siding?

A. Yes, sir.

By Mr. DEMMING:

Q. That is to say, in going on the main line from Nazareth to Bangor, the Pen Argyl branch leaves on the left-hand side?

A. Yes, sir.

Q. And Pen Argyl lies in what direction from the main line at that point?

A. It lies about north.

Q. Pretty nearly directly north?

A. Yes, sir.

By the COURT:

Q. How does the main line run??

A. It runs about east and west.

Q. From Nazareth to where?

35 A. From Nazareth to Portland.

Q. Nazareth is the furthest west, is it?

A. Yes, sir.

Q. Then, it runs east to Portland?

A. Yes, sir.

Q. This line that takes off to Pen Argyl—that is, going towards Portland, west—does it take off on the left or the right?

A. On the left, going east.

Q. Then, it shoots off to the east going east?

A. Yes, sir. Going east.

Q. Out towards the northeast?

A. Yes, sir.

Q. Then, where does that branch off—at what point?

A. What they call Pen Argyl Junction there.

Q. Then, how far does it run?

A. Really, I don't know the distance.

Q. To what point? What is the terminus?

A. Pen Argyl.

Q. That is the northeast terminus of the branch?

A. Yes, sir.

Q. Where is this switch? Is that at Pen Argyl, the one that these cars stood on?

A. That is in the Pen Argyl district, yes, sir.

Q. Is it on the left-hand side or right-hand side?

A. The right-hand side.

Q. On the right-hand side going towards Pen Argyl?

A. Yes, sir.

Q. What is the grade from that point?

A. I don't know.

By Mr. DEMMING:

Q. Just at that point, or about at that point, where the Pen Argyl branch leaves the main line, is it the top of the grade, is it not?

Mr. CAMPBELL: I object. That is grossly leading.

36 By Mr. DEMMING:

Q. About where is the top of the grade?

A. At the West Albion Switch there.

Q. Which do you call West Albion?

A. The siding to the right, leading from Nazareth to Portland.

Q. Do you mean Albion No. 1?

A. No, sir.

Q. West Albion?

A. West Albion.

Q. With reference to the Pen Argyl branch, where is the top of the grade?

A. It is close by there.

Q. It is very close to it, is it not?

A. Yes, sir.

By the COURT:

Q. Close by where?

A. Pen Argyl Junction.

By Mr. DEMMING:

Q. Where the Pen Argyl branch leaves the main line?

A. Yes, sir.

Q. That is very close to the top of the grade?

A. Yes, sir.

Q. Is it a fact that the grade runs down then towards Nazareth for miles in that direction?

A. Yes, sir. Not many miles. I don't know how many miles.

Q. How many miles do you think?

A. Really, I don't know.

Q. Several miles?

A. Several miles down there.

Q. In the other direction the grade runs down towards Bangor, does it not?

A. No, sir. It runs towards Martin's Creek Junction.

Q. How many miles in that direction does it run down?

37 A. About three miles.

Q. While we are on that subject, I want to ask you this:

Is there a derailing switch on Albion Siding No. 2, from which these cars came?

A. No, sir.

Q. What sort of a switch is there there?

A. I don't quite catch that.

Q. It is a regular point switch, is it?

A. Yes, sir; a regular point switch.

Q. An ordinary switch?

A. Yes, sir.

Q. Is there a derailing switch on Albion Siding No. 1?

Mr. CAMPBELL: I object. It does not have anything to do with No. 2.

Mr. DEMMING: I want to show the general similarity between one siding and another siding. All sidings leading on to the main line

are similar at least in that respect. It has a great deal of bearing on the case.

Mr. CAMPBELL: With these sidings coming off, there may be a difference of two or three degrees in a hundred yards, in a mountain district. Unless he proves the similarity of these two points, the question is not proper.

Mr. DEMMING: It is perfectly proper to show what precautions they have taken in their sidings right in this very yard. Of course, it is a question for your Honor to decide.

The COURT: How close by is it?

By Mr. DEMMING:

Q. How far is it, in your judgment, from the Pen Argyl Junction, from where the Pen Argyl branch leaves the main line, to Pen Argyl?

A. I don't know.

Q. About how far?

38 By the COURT:

Q. Is this practically on a down grade where these cars stood?

A. Do you mean the Albion No. 2?

Q. Yes. Where these ash cars stood.

A. Why, yes.

By Mr. DEMMING:

Q. There is quite a grade on that siding, is there not?

A. I don't know the grade.

Q. There is a grade on the siding?

A. Yes, sir.

Q. At all events, when the cars ran off of there there was no engine or anything else near to push them off?

A. I don't know that.

Q. Was your engineer there?

A. No, sir.

Q. Your engine is the only yard engine, is it not?

A. There are other engines come through besides ours.

Q. You people investigated this all afterwards, did you not?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

By Mr. DEMMING:

Q. You were a quarter of a mile away from this siding?

A. Yes, sir.

Q. So far as you know, was there any engine or anything else near these cars that ran away?

A. I don't know that.

Q. So far as you know, was there?

A. I couldn't tell you. Because we weren't around there, and I didn't see anything, so I couldn't tell you.

Q. You did not see any.

39 A. No, sir.

Q. From where the Pen Argyl branch leaves the main line up to Pen Argyl town, how far is it, do you think?

A. Probably a quarter of a mile.

Q. Do you think it is further than that?

A. I don't think so.

By the COURT:

Q. Then, that branch is only a quarter of a mile long?

A. About a quarter of a mile, yes, sir.

Q. From the Junction up to the town?

A. Up to the town.

By Mr. DEMMING:

Q. How far is it, do you think, from Albion Siding No. 1 to Albion Siding No. 2?

A. That would just depend on how you go. You can cut right across if you want to.

Q. From the nearest point to the nearest point?

By the COURT:

Q. From where the one takes off to where the other takes off.

A. About fifty yards.

By Mr. DEMMING:

Q. There is, you say, a considerable grade on Albion Siding No. 2, from which these cars came?

A. I don't know the grade.

Q. There is a grade?

A. To a certain extent.

Q. Is there a grade on Albion Siding No. 1?

A. A grade, yes.

Q. Is it as much as on Albion Siding No. 2?

A. I don't know. I don't know the grade of the switch.

Q. You have been shifting cars on those sidings for how many years?

A. We don't measure the grades, though.

40 Q. I know that, but just answer the question. For how many years have you been putting cars on this siding?

A. I have been around there nearly ten years.

Q. From your experience of putting cars on these different sidings, which siding do you think has the steeper grade?

A. I couldn't tell you.

By the COURT:

Q. You have been putting cars on them for ten years?

A. Yes, sir.

Q. And have no idea which has the most grade?

A. No, sir; I have not. We never had any occasion to know that.

By Mr. DEMMING:

Q. You would not have any occasion to know it?

A. No, sir.

Q. What sort of a grade is there on the Pen Argyl branch?

A. I don't know the grade of that switch.

Q. Isn't that a considerable grade?

A. There is quite a grade in there, yes, sir.

Q. Is it not a sufficient grade to allow cars to start themselves on it?

A. Yes, sir.

Q. Didn't you, as a matter of fact, do your shifting sometimes by taking the brakes off the cars and allowing the cars to run down and connect with your train?

A. Yes, sir.

Q. They come down with their own momentum, don't they?

A. Yes, sir.

By the COURT:

Q. Off of both these switches?

A. That is the Pen Argyl branch.

41 Q. Can you let them run down from these switches?

A. What switch have you reference to?

Q. Either of these two switches?

A. We always drop them by on the Pen Argyl branch.

By Mr. DEMMING:

Q. By that you mean you let them run of their own momentum?

A. Yes, sir.

By the COURT:

Q. From these switches?

A. No. From the Pen Argyl branch. We put cars there and let them drop by, either to the engine or out on the main line leading over from Portland, and drop them behind the engine. That is, off the branch.

By Mr. DEMMING:

Q. Albion No. 2 is a part of that branch?

A. Yes, sir. It leaves off from that branch.

Q. But it is connected with that branch?

A. Yes, sir.

Q. I will ask you again, based upon that experience, which of these two sidings—Albion No. 2 and Albion No. 1—has the greater grade?

A. Really, I couldn't tell you.

Q. Can you tell us approximately? Which do you think has the greater grade?

Mr. CAMPBELL: I object to what the witness thinks.

By Mr. DEMMING:

Q. Based upon your experience with these sidings?

Mr. CAMPBELL: I object.

42 The COURT: He say- he does not know. It seems curious to me, shifting cars for many years, that he cannot say which has the greater grade.

The WITNESS: We never do any shifting on Albion No. 1 at all.

By Mr. DEMMING:

Q. You say it is only fifty yards from Albion 1 to Albion 2?

A. That is cutting right across.

Q. We had better confine ourselves to the track, the nearest distance by the track.

A. It is further up the track. Considerably.

Q. How much further?

A. It is again as far, if not more.

Q. You mean a hundred yards?

A. Yes, sir.

Q. If not more?

A. If not more.

Q. Albion No. 2 is the next siding to Albion No. 1, is it not?

A. Yes, sir.

Q. What kind of switches have they on Albion Siding No. 1?

A. Point switch.

Q. What other kind of switches?

Mr. CAMPBELL: I object because there is no testimony yet as to the dissimilarity of these two places or the similarity of them.

The COURT: We will leave it out for the present.

By Mr. DEMMING:

Q. When had you last seen those cars that ran away?

A. About twelve o'clock noon on the twentieth day of July.

Q. That was the day before the accident?

A. Yes, sir.

43 Q. Under what conditions did you see those cars on the day before the accident?

A. We saw them standing there.

Q. Did you put those cars in there?

A. Yes, sir. We did.

Q. Your crew put them in there?

A. Yes, sir.

Q. What time was it when you put them in?

A. About eight o'clock, as near as I can get at it. It was about that time.

Q. On Tuesday, the 20th?

A. Yes, sir.

Q. The day before the accident?

A. Yes, sir; the day before the accident.

Q. Where had you found those cars?

A. On the same switch.

Q. On the same siding?

A. Yes, sir.

Q. You took them out, as I understand, and then put them back? Is that correct?

A. Yes, sir.

Q. Why was it you did that?

A. We had to put a few empty box cars on the rear end of the switch.

Q. That is, for this quarry?

A. Yes, sir.

Q. Of course, then you had to take these cars out to put your box cars in?

A. Yes, sir.

Q. And then you replaced these cars?

A. Yes, sir.

Q. How many cars were there?

A. Ash cars?

Q. Yes. How many ash cars were there?

A. Six.

Q. What kind of cars were they?

A. We call them "hoppers."

Q. Gondola cars?

44 A. Yes, sir.

Q. Regular Delaware, Lackawanna and Western cars?

A. Yes, sir.

Q. Do you know how long they were?

A. No. They were probably about thirty feet.

Q. That is, including the bumpers?

A. No. They are longer than that with the bumpers, the draw-heads.

Q. Including those, how long?

A. Probably about thirty-six feet.

Q. They were loaded, you say, with ashes?

A. Yes, sir.

Q. How high up were they loaded?

A. They were loaded full.

Q. Heaped high, so that you could see it over the sides?

A. I don't just recollect just how they were loaded?

Q. When you put those cars back what did you do towards keeping those cars there?

A. Set the brakes and blocked them.

Q. I am asking you yourself what you did.

A. I put two blocks under and helped double over one brake.

Q. Which car was it you put the brake on?

A. The car next to the engine.

Q. That would be the first car towards the Pen Argyl branch?

A. Yes, sir.

Q. By blocks, you mean you put blocks under the wheels?

A. Yes, sir.

Q. How many blocks did you put under?

A. I put two blocks under.

Q. Do you mean two blocks under two wheels, or two blocks under one wheel?

A. No. Two blocks under two cars.

45 Q. What do you mean by a block—what kind of blocks?

A. A wooden block.

Q. You mean a piece of wood.

A. A piece of wood, yes, sir.

Q. Do you mean wood that was made to fit under in a wedge, or a block?

A. No, sir.

Q. You just picked up some wood and threw it under the wheels? Is that it?

A. Yes, sir.

Q. Is that siding in the same condition today as it was at the time of the accident?

A. Yes, sir.

Q. No changes have been made?

A. No, sir.

Q. The same siding exactly?

A. The same siding.

Q. In all particulars?

A. Yes, sir.

Q. Did you see the regular crew—that is, Troxell's crew, the regular freight crew—put these cars in on Monday, the day before?

A. No, sir.

Q. You just found those cars there?

A. Yes, sir.

Q. I did not ask you about this when I was speaking to you about the quarries; it is a fact, is it not, that there are frequent blasts in those quarries?

A. Yes, sir.

Q. That is going on all the time, is it not?

A. I don't notice when they do blast. Sometimes I notice them blasting around there, but I don't know just what time.

Q. One quarry blasts and then another quarry blasts?

A. Yes, sir.

Q. And one quarry, as you have said, is right alongside
46 of the track down where the Pen Argyll branch leaves the main line, is it not?

A. Yes, sir.

Q. Those blasts are quite heavy, are they not, some of them?

A. Pretty heavy, yes, sir.

Q. There is absolutely no reason why anyone could not have access to those cars, is there? It is all open around there, is it not?

A. Yes, sir.

Q. It is very close to the town?

A. Yes, sir.

Q. No fences?

A. No, sir.

Q. Is it not a fact also that there is a patch right alongside of this track?

A. Yes, sir.

Q. And is not that in use by hundreds of workmen every day?

- A. I see some go through there, but I don't know how many.
Q. A great many of them?
A. Yes, sir.
Q. Walking back and forth?
A. Going to work that way.
Q. Two or three times a day?
A. Yes, sir.
Q. From the quarries to the town?
A. Yes, sir.
Q. And this path is right alongside of this siding, Albion No. 2?
A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

- Q. How long did you say you had been shifting cars on Albion No. 2 switch?
A. I have been on that job two years in December.
47 Q. Had you ever put any cars in there before?
A. Yes, sir.
Q. Have you put in as many as six cars before?
A. Yes, sir. We have put eighteen in there already.
Q. Have you ever had any run away?
A. No, sir.
Q. Did you ever hear of any running away?
A. No, sir.
Q. These sixteen or seventeen cars you are talking about, were they loaded or not?
A. They were light.
Q. Have you ever had as many as six loaded cars in there?
A. Yes, sir.
Q. More than six?
A. Yes, sir.
Q. You say you and the brakeman doubled on the first brake?
A. On the first brake, yes, sir.
Q. When you say doubled, you mean both took hold of it and put it in strong?
A. Yes, sir.
Q. Was that brake locked right in?
A. Yes, sir.
Q. How did you put your blocks under?
A. I put the block under the wheel and I took my foot and kicked it and wedged it under the wheel.
Q. That was the first block you put in. Where did you put the second block?
A. Under the second car, under the front truck.
Q. Did you see anybody else putting blocks under or putting brakes on?
A. I saw one of the brakemen going over to the cars and winding brakes, yes, sir.

By Mr. DEMMING:

Q. Which brakeman was that?

A. Grupe.

48 By Mr. CAMPBELL:

Q. Would those brakes hold those cars?

A. Yes, sir.

Mr. DEMMING: Which cars are you talking about?

Mr. CAMPBELL: The ash cars.

By Mr. CAMPBELL:

Q. How many brakes would hold an ash car of that kind, if you know, on that switch, or at that place?

Mr. DEMMING: If he knows. The question is what it did on this particular occasion.

Mr. CAMPBELL: Mr. Demming brought out from this witness that there is no derail there. This witness, who has been there for ten or fifteen years, can state whether or not a derail is necessary, in his opinion, or if a car blocked and braked is sufficient.

The COURT: I think that is a question for the jury.

By Mr. CAMPBELL:

Q. Tell us whether or not a block or two blocks and double braking the first car and braking a car or two in the rear of these six would hold them?

A. Yes, sir.

Q. How could those cars get away if thus braked and thus blocked?

A. Somebody tampering with the brakes and knocking the blocks out. That is the only way I know.

Q. Would a blast from these quarries have any such effect?

A. I don't think so, no, sir.

Q. Did you ever hear of any such thing happening?

A. No, sir. I never heard of anything like that.

Q. How long has that switch been there, to your knowledge?

49 A. About eight years.

Q. You have been working around it all the time?

A. Yes, sir.

Q. Shifting cars in there all the time?

A. Yes, sir.

Q. Did you know the decedent, Troxell?

A. I knew him, yes, sir.

Q. Did you ever see him shifting cars in on that switch?

A. No, I never saw him on that switch.

Q. You would be out on the line when his locomotive would be in there? Is that right?

A. Yes, sir.

Q. What size blocks did you put under those cars?

A. The block we put under was probably about two inches thick.

seventeen or eighteen inches long, and probably three or four inches wide.

Q. Is that the usual method of blocking cars on that division? Is that the usual kind of a block you use?

A. We use most any kind of a block we can pick up along the track.

Q. Did you see this block after the cars got away?

A. Yes, sir; we did. I don't know whether we saw these blocks, but we saw blocks lying along the track.

Q. How far away from the track?

A. Probably two or three feet.

Q. Could those blocks have gotten shoved off the track by the movement of the cars?

A. Not that far, I don't think.

Q. Do you know?

A. No, sir; they wouldn't go that far.

Q. How could they get four or five feet from the track?

A. The only way I know is by somebody taking them out.

50 Redirect examination.

By Mr. DEMMING:

Q. You never experimented with blocks to see how far a train would push the blocks away, did you?

A. Nature would teach you that a wheel running over a block, it would not fly?

Q. Is it not a fact that one of these blocks was cut in two?

A. There were blocks under those cars when they pulled them out.

Q. When you went back there to look, was not one of those blocks cut in two?

A. Not any of those that I put in.

Q. Wasn't there a block there cut in two?

A. There was a block there cut in two, yes, sir.

Q. Showing that the wheels had gone over it and cut it in two?

A. Yes, sir.

By Mr. CAMPBELL:

Q. That was not one of the blocks you put under?

A. No, sir.

Q. You say you pulled the cars over a block when you pulled them out?

A. Pulled the cars over a block.

By Mr. DEMMING:

Q. Could you identify that block, to know whether it was the one you put under, or not?

A. No, sir.

By Mr. DEMMING:

Q. But the blocks four or five feet away from the track were the blocks you put under?

Mr. DEMMING: That is leading.

By Mr. DEMMING:

Q. You did not identify the blocks, did you?

A. No, sir.

51 Q. You have been asked on cross-examination whether you did not put six loaded cars in there at other times?

A. We did, yes, sir.

Q. When did you do that? How long before this accident?

A. I don't know. We have been using that switch and have fetched another train up.

Q. Tell us one time when you put in six loaded cars before.

A. I don't recollect.

Q. You have also said in cross-examination that you did not think that blasts could start those cars.

A. No, sir.

Q. You don't know about that, do you?

A. No, sir.

Q. There is no doubt whatsoever but what these cars did start off themselves that morning, is there?

A. I have no idea, unless somebody tampered with the brakes.

Q. At all events, no engine pushed them or started them?

A. No, sir; no engine.

Q. Nobody connected with the Railroad Company, so far as you know, started these cars?

A. No, sir.

Q. They started of their own volition in some manner?

A. In some manner, yes, sir.

Recross-examination.

By Mr. CAMPBELL:

Q. Haven't you testified that these cars must have moved by somebody tampering with the brakes or removing the blocks?

A. I say that is the only way.

By Mr. DEMMING:

Q. That is your opinion of it?

52 A. Yes, sir.

By Mr. CAMPBELL:

Q. And your opinion is, that no blast would have moved them?

A. No, sir.

Q. And no wind?

A. No, sir.

Q. So, in your opinion, that train must have moved by somebody tampering with the brakes and tampering with these blocks? Is that right?

A. Yes, sir.

By Mr. DEMMING:

Q. You do not know one way or the other, do you? You do not pretend to say whether anybody tampered with them that started them?

A. I don't know how they started.

Q. You only know that they started and went off?

A. I didn't see them start. The only thing I know, they told me they ran away.

By the COURT:

Q. What time in the day was it?

A. That the cars ran away?

Q. Yes.

A. About half-past seven, as near as I can find out.

Q. In the morning?

A. Yes, sir.

Q. Daylight?

A. Yes, sir.

By Mr. CAMPBELL:

Q. You were there in February, weren't you, making tests with these ash cars in that switch?

A. Yes, sir.

Q. How many brakes did you find necessary to hold those ash cars in there relatively at the same place?

53 A. Two brakes to the cars.

Q. Without or with blocks?

A. With blocks.

Mr. DEMMING: Unless he testifies to the conditions that morning, I do not think it is a similar case. I would like to have what the condition was.

By Mr. CAMPBELL:

Q. Describe the conditions, what you did with the cars and what you saw in effect when you made those tests?

A. We shoved cars in there, and we put on brakes, and we got them blocked, to find out how many brakes would hold them.

Q. How many brakes did hold those cars?

A. Two brakes.

Q. With or without blocks?

A. With blocks.

Q. How many blocks?

A. One block.

Q. As a matter of fact, did not two brakes hold the cars without blocks?

Mr. DEMMING: I object to this leading of the witness.

Mr. CAMPBELL: It is cross-examination.

The COURT: No; it is not cross-examination. You are introducing new matter, and you are examining him indirectly on new matter. (Objection sustained.)

WILLIAM H. GRUPE, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Flicksville, Pennsylvania.

54 Q. It that near Pen Argyl?

A. About five miles.

Q. You are a brakeman on the yard crew?

A. Yes, sir.

Q. The gentleman who just left the stand, Quintus Ruch, is your conductor?

A. Yes, sir.

Q. Did you work in Troxell's crew?

A. No, sir.

Q. When did you first hear of the accident?

A. About seven-thirty in the morning.

Q. That is, the morning of the 21st?

A. Yes, sir.

Q. How did you know about it?

A. The conductor was telling us.

Q. How far do you think you were from this siding when these cars ran away?

A. From the Albion No. 2 siding?

Q. The Albion No. 2, yes, sir.

A. A good quarter of a mile.

Q. You were not anywhere near the cars to interfere with them or to start them yourself, were you?

A. No, sir.

Q. And no other crew was in there at the time?

A. That I couldn't tell.

Q. You saw no other crew?

A. I couldn't see from where we were.

Q. You could not see that siding?

A. No, sir.

Q. There is no doubt but that these cars went away by themselves, is there?

A. Well, they went out of there, yes, sir.

Q. They went out of there themselves? When had you seen those cars before?

A. On the 20th.

Q. That is, the day before?

A. Yes, sir.

Q. What time of the day?

55 A. Somewhere around close on to eight o'clock.

Q. In the morning?

A. Yes, sir.

Q. Just tell us what you had done to the cars.

A. We had a few cars to place at the rear end of the load, and we picked these cars out and set them out on the Pen Argyl branch, and

put the empty cars back, and picked these cars up and put them in again.

Q. The cars that you put in there were box cars, were they, as the conductor testified?

A. Yes, sir.

Q. You put those in there to supply that quarry?

A. Yes, sir.

Q. When you put those six loaded ash cars back, how many feet do you think you put the first car from the point of the frog, we will say, of the Pen Argyl branch? How far do you think it was—a hundred or two hundred feet?

A. Not from the point of the frog. From the point of the switch 180 feet—from 175 to 180 feet.

Q. Do you mean the point of the switch or the point of the frog?

A. The point of the switch.

Q. Here is a toy switch. You say 180 feet from the point of the switch to the nearest car. We will say that is the frog. (Referring to toy switch.)

A. That is the switch.

Q. You mean from this point?

A. From the switch point. (Indicating point on switch furthest away from the frog.)

Q. That correctly represents, does it not, the relative positions? (Sketch handed witness.)

A. Yes, sir.

Q. This straight line is the Pen Argyl branch?

A. Yes, sir.

Q. And this is the Albion No. 2 Siding?

A. Yes, sir.

56 Q. It ran off on the right that way, didn't it?

A. Yes, sir.

Q. And this is the main line down here?

A. Yes, sir; the main line.

Q. Is that sketch accurate, to your recollection?

A. Yes; that is about correct.

(Sketch marked, "Exhibit A, 4-4-'10, C. F. P.")

Q. That Albion No. 2 Siding, on which these cars were placed, has a little stream running under it, has it not? Do you remember there is a little bridge?

A. Yes, sir. There is a little stream.

Q. With reference to that little bridge over that stream, how far do you think the first car was from that little bridge, the first car towards the main line? Was it pretty close to that bridge?

A. I couldn't tell.

Q. You agree with the conductor, do you, that these were gondola cars?

A. Yes, sir.

Q. Do you know the exact length of those cars?

A. They may be thirty-five or thirty feet cars. They are almost all fifty capacity cars.

Q. They were heaped up with ashes, were they not?

A. Yes, sir.

Q. Loaded cars?

A. Yes, sir.

Q. There is a derailing switch on Albion Siding No. 2, is there?

A. No, sir.

Q. What is the grade on that Albion Siding No. 2—do you know?

A. I couldn't tell you.

Q. It is an up grade, however?

A. There is a grade there.

Q. Considerable of an up grade, is there not?

(Objected to as leading.)

Q. Is it considerable or small?

57 A. There is a small grade there. That is something I don't know much about, that grade business.

Q. Is there a grade on Albion Siding No. 1?

A. Yes, sir.

Q. Is Albion Siding No. 1 the siding nearest to Albion Siding No.

2? There is no other intervening siding, is there?

A. No, sir.

Q. With reference to these two sidings, do you think Albion No. 2 or Albion No. 1 has the steeper grade?

A. To my opinion, about the same.

Q. I asked you what sort of switches there were on Albion No. 2. There is no safety switch on Albion No. 2? What sort of switches are there on Albion No. 1?

A. There is what we call a short run around there.

Q. I do not mean with reference to switching the cars. Is there a regular point switch on that siding?

A. Yes, sir.

Q. What other kind of switches?

A. That is all there is on Albion 1.

Q. Are there no derailing switches on Albion No. 1?

(Objected to as leading.)

At 1 p. m. Court took a recess until 2 p. m.

2 O'CLOCK P. M.

Present: Parties as before noted.

WILLIAM H. GRUPE, recalled.

By Mr. DEMMING:

Q. You are still employed by the company?

A. Yes.

58 Q. You are still in the yard crew?

A. Yes.

Q. You have said that you thought the nearest point of first car towards the Pen Argyll branch—the first one of these ash cars, was one hundred and eighty feet, or at least one hundred and eighty feet from the point of the switch?

A. Yes, sir.

Q. Do you think it could have been further than that? Are you just approximating that?

A. I do not know. I do not think any further than that.

Q. Do you recall that little stream, the little brook that runs under that Albion siding No. 2? You recall that, do you not? There is a little stream, a brook?

A. Yes; to the back of the switch there a ways.

Q. We will take the rear of those six cars. Do you think that the last one of those six cars, the last one from the Pen Argyl branch, was over that bridge?

A. That I could not tell.

Q. You cannot remember that at all?

A. I cannot remember that.

Q. But you do believe that the first car was at least 180 feet from the point of the switch?

A. Yes.

Q. How far do you think it is from the point of the switch to the frog? By the point of the switch you mean that, do you (indicating)?

A. Yes, sir.

Q. And here is the frog (indicating)?

A. Yes.

Q. How far do you think it is from here to here, from the point of the switch to the frog? About how far?

A. I should judge about thirty feet.

Q. How many years' experience have you had as a brakeman, or working on the railroad?

59 A. A little over three years—that is, the last term.

Q. As a matter of fact, it is a very easy thing for cars to run off a single point switch, such as this, if the switch is closed against them?

A. Explain that.

Q. Suppose that switch is closed, as it is there, against the cars standing on the siding up here.

A. Yes, sir.

Q. If those cars start to run away; it is an easy thing for them to run over that switch?

A. Yes; they will go over the switch all right.

Q. Explain to the jury how they do that. What happens when they do that?

A. What happens to the switch?

Q. Do they break the switch, or bend it?

A. They bend this point here oftentimes. They will oftentimes bend this, what they call the switch rod.

Q. When they run over the switch, therefore, bending that point, the wheel just goes from here over there, and continues on?

A. It throws this over, yes.

Q. Have you often seen that done?

A. Not very often; no, sir.

Q. You have seen it done?

- A. I have seen it done once or twice.
- Q. It does not derail the cars?
- A. No; it does not derail the cars. I never saw it derail them.
- Q. I think you have said there was no derailing switch at Albion Siding No. 2, from which these cars came?
- A. No derailing switch.
- Q. At the time we took recess you were asked the question what kind of switches there are on Albion Siding No. 1, the next siding to No. 2, a few feet away. Do you remember that now?
- 60 A. Albion No. 1 switch, you mean?
- Q. Albion No. 1 switch, yes.
- A. There are two points. The switch is open at both ends.
- Q. It has a point switch at both ends?
- A. Yes.
- Q. Connecting with the line?
- A. Yes.
- Q. Is there any other kind of a switch on it?
- A. No, sir.
- Q. No derailing switch on Albion No. 1?
- A. No derailing switch, no, sir.
- Q. Is this Albion Siding No. 1 indicated on there?
- A. This here is supposed to be Albion.
- Q. You understand that, do you? There is the main line, and here is the Pen Argyl branch. Here is Albion No. 2, from which these cars came?
- A. Yes.
- Q. Does that indicate Albion siding No. 1?
- A. No; this is west Albion down here (indicating).
- Q. Where do you think Albion No. 1 is?
- A. Albion No. 1 is down in here. It starts about here, and goes down below (indicating).
- Q. This is West Albion?
- A. Yes, sir.
- Q. West Albion is the siding used for standing cars, is it not?
- A. For unloading, and loading both.
- Q. Do you stand cars on Albion No. 1?
- A. No, sir.
- Q. Never stand them there?
- A. No; do not put cars there.
- Q. You never do that?
- A. Never on No. 1. Never use Albion No. 1 siding.
- Q. Where is Albion No. 1? Does it run to the left or to the right of the main track, going towards Bangor?
- 61 A. Left.
- Q. Is it beyond where West Albion switch begins?
- A. About back here (indicating), the point of Albion No. 1 is about to the heel of the frog of West Albion.
- Q. About here. Is that right?
- A. Back a little farther than that. Make it that way.
- Q. This is West Albion?
- A. This is West Albion, yes.

Q. Does Albion No. 1, after leaving the main line, go back again and connect again with the main line?

A. Yes.

Q. How far does it run, do you think, beyond here? About like that? Something like that? (Indicating.)

A. Something like that.

Q. That is Albion No. 1?

A. Yes.

Q. That is right, is it?

A. Yes.

Q. This is West Albion?

A. Yes.

Q. In order to get it straight, I will ask you again. On Albion No. 1 you never allow the cars to stand?

A. We never put cars there at all.

Q. It is not used for that purpose?

A. No.

Q. It is used for one train to pass another, I suppose?

A. Yes.

Q. But on West Albion siding you do put cars to stand?

A. Yes.

Q. The West Albion siding is how far from Albion siding No. 2? About how far? How many feet?

A. One hundred yards.

Q. That would be 100 yards going by Pen Argyl branch?

62 A. Yes.

Q. You have said that on Albion No. 1 your cars are never allowed to stand, that it is used for one train to pass another, and that there are only point switches?

A. Yes.

Q. What kind of switches are on West Albion siding where you do stand cars?

A. Point switches.

Q. What other kinds?

A. Derailing switches.

Q. On both ends of the siding?

A. Yes.

Q. With reference to the grade? Is the grade on West Albion siding greater or less than the grade on Albion siding No. 2, from which these cars came?

A. That is more than I can tell you.

Q. You would not like to say?

A. I do not know anything about the grade part. I could not tell you that.

Q. Based upon your experience in putting cars in on those sidings?

A. We have got to put the brakes on good on both switches to hold them.

Q. On both sidings. Then you think the grade is about the same?

A. About the same as near as I can tell.

Q. But on West Albion there are derailing switches, while on Albion No. 2 there are no derailing switches?

A. No.

Q. Is it not a fact that this company was putting in derailing switches during that summer on different siding?

A. That is more than I can tell you.

Q. Did not you notice that taking place that summer?

A. No, sir; I did not notice that.

63 Q. You do not know anything about that?

A. I do not know anything about that.

Q. How many brakes did you put on on those ash cars when they were put on Albion siding No. 2?

A. Four brakes.

Q. Tell us whether or not any of those brakes were defective?

A. The brakes were all in working order.

Q. How about the dogs?

A. All right.

Q. Do you recall being before the Coroner?

A. Yes, sir.

Q. Did not you say before the Coroner that some of those dogs were loose?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir; I am sure of that. The dogs were all right.

Q. You remember that they were all right?

A. Yes; the dogs were all right, in working order.

Q. Those brakes were put on the day before these cars ran away?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. What is Albion siding No. 1 used for?

A. For passing trains.

Q. Is it used to store cars?

A. Albion 1?

Q. Yes.

A. No, sir.

Q. Did you see your conductor and trainman Ackerman put any brakes on these cars when you put them in there on the 20th?

A. No. I was not looking.

Q. You say you braked the four last cars?

A. Yes.

64 Q. Braked them strong?

A. As strong as I could pull with my hands, as strong as I could pull with my hands.

Q. You are pretty strong, are you not?

A. Pretty stout.

Q. Could you tell us whether or not those cars could get away after you applied the brake on the four rear cars, unless somebody interfered with them?

A. No, sir; they could not.

Q. Would any blasting operations in the neighborhood affect them?

A. No, sir.

Q. You say unless somebody interfered with them, the cars could not have gotten away?

A. Somebody would have had to interfere with them.

Q. Did you interfere with them afterwards?

A. No, sir.

Q. That derailing switch on Albion No. 2—you knew there was no derailing switch there, did you not?

A. Yes.

Q. All of you knew it?

A. Yes, sir.

Q. The fact that it was not there was plainly apparent, was it not?

A. Yes.

Mr. DEMMING: I object to the witness testifying to what they all knew.

By Mr. CAMPBELL:

Q. If there is a derailing switch on a siding, as on Albion No. 2, what is necessary to be done when you are putting the cars in there?

A. You must stop and close your derail.

Q. After you have got the cars in there, what is done?

A. You cut your engine off, get out and stop and throw it back.

Q. What becomes of the locomotive during that?

65 A. It waits.

Q. When you put in cars on a siding such as that, what is the locomotive doing? Does it hold on to the cars and keep them in place?

A. Yes, sir.

Q. When you have a derail on a siding, after you put a draft of cars in there, or are going away, what do you do with the derail?

A. We open the derail and lock it.

Q. You open it up?

A. Yes.

Q. You open it up and lock it?

A. Yes, sir.

Q. Then if the car starts, it will go off the track?

A. Yes, sir.

Q. It cannot get out on to the main track?

A. It cannot get out.

By Mr. DEMMING:

Q. Where there is a derail switch?

A. Yes.

By Mr. CAMPBELL:

Q. I understood you to say that these cars could not get out with the four brakes set that you set yourself?

A. No.

Q. Unless somebody interfered with the brakes themselves?

A. Yes.

Q. You say you did not interfere with them?

A. No, sir.

Q. And never heard of anybody else interfering with them?

A. No, sir.

By Mr. DEMMING:

Q. That is merely your opinion, is it not, that the cars could not get out without somebody interfering with them?

66 A. I do not see how they could.

Q. When the brakes are allowed to stand, even though they are set, do not they gradually work loose?

A. Not on a loaded car.

Q. Of course, we all know, or a good many know, that the load presses down on the brakes and gradually strains the brakes, but these cars were not such cars?

A. These cars were loaded.

Q. Even after you pull the brake tight—you are a strong man—is not there a tendency for the loose parts to gradually work loose?

A. No, sir.

Q. Slack?

A. No, sir; with a loaded car there is not.

Q. That is your opinion. You mean by the answer you made to the gentleman on the other side, that you do not know of any other reason why the cars ran away?

A. I certainly do not know.

Q. But that is merely your judgment?

By Mr. CAMPBELL:

Q. How long have you been railroading?

A. I have been railroading about eleven years.

Q. Did you ever know of cars to get away on a grade like that, or worse, that were braked in the manner you broke those cars?

A. No, sir.

Q. You never heard of such a thing?

A. No, sir.

By Mr. DEMMING:

Q. This siding, Albion siding No. 2 is open? Anybody can get into that and have access to it? Is not that so? Albion siding No. 2, where you put those cars, is very near to the town?

A. It is very near to the town.

67 Q. All that ground around there is open?

A. Yes.

Q. No one would have any difficulty whatsoever to have access to those cars?

A. No, sir.

Q. Was not there a path alongside of these very cars used by all these workmen?

A. Yes.

Q. Going back and forth to the quarries. That is true, is it not?

A. Yes.

Q. Hundreds of men use that path every day, do they not?

A. I suppose they do.

Q. There is no watch kept upon those cars to see whether or not anybody interferes with them?

(Objected to.)

(Objection sustained.)

By Mr. DEMMING:

Q. You were asked on cross-examination whether the brakemen, or whether some member of the crew would not have to turn the derail switch as well as the point switch, when those switches are used, and you said yes. Whose duty would that be to do that?

A. That all depends on the man that is on the ground, the man nearest to it.

Q. Would it be the brakeman's duty or the conductor's duty?

A. The conductor or the brakeman.

Q. The engineer and fireman do not do that?

A. No. They have nothing to do with that.

Q. That is no part of their duty?

A. No, sir.

Mr. DEMMING: Where Mr. Campbell has used this witness as an expert as to whether or not these cars would run away, even though the brakes be put on, I move that that be stricken out. It was under objection.

68 (Motion overruled.)

(Exception noted for plaintiff, by direction of the court.)

By Mr. DEMMING:

Q. I will ask you, under the objection and exception, whether the statement of yours that these cars must have been tampered with is a guess on your part?

A. A guess? No, sir; it is not a guess. They must have been tampered with, or they would not have run out of there.

Q. You do not know, as a matter of fact, what happened to these cars?

Mr. CAMPBELL: I object to the cross-examination of the witness.

By the COURT:

Q. Do you know how they got out of there?

A. No, sir; I do not know how they got out. That I do not know.

ALVIN E. ACKERMAN, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. What is your business?

A. Working at the quarry at the present time.

Q. Where?

A. Bangor.

Q. Pennsylvania?

A. Yes, sir.

Q. You live in Bangor?

A. Yes, sir.

Q. What were you doing on the 21st of July of last year?

A. Working for the Delaware, Lackawanna & Western Railroad Company.

Q. In what capacity?

69 A. As brakeman on a yard engine.

Q. You were brakeman on the yard crew at Pen Argyl?

A. Yes, sir.

Q. And Mr. Grupe, who just left the stand, was your fellow brakeman?

A. Yes, sir.

Q. And Mr. Ruch was your conductor?

A. Yes, sir.

Q. You were not part of Mr. Troxell's crew?

A. No, sir.

Q. What was the first you knew of this accident,—of these cars getting away?

A. The first I knew of it was what our conductor told us at West Bangor Junction.

Q. Was that the morning of the accident?

A. Yes, sir.

Q. When was the last time you had seen these cars that ran away?

A. Somewhere around noon of the day before.

Q. What were you doing to these cars at that time, if anything?

A. At noon, you mean?

Q. Yes.

A. We were not doing anything with these cars. We passed the switch, and went up town.

Q. You saw them in on the siding then?

A. Yes.

Q. Had your crew put these cars in on that siding?

A. We placed them on that siding that morning.

Q. At what time?

A. In the neighborhood of eight o'clock, probably a little later.

Q. Eight o'clock on the day before the accident?

A. Yes.

Q. And that was Tuesday the 20th?

A. Yes.

70 Q. Why did you put these cars in on that siding?

A. We took them out of there, placed a couple of empty box cars behind them, took those cars out and set them out on the Pen Argyl branch, and placed a couple of empty box cars, to be loaded with slate, and set them back in again.

Q. Put them back again?

A. Yes.

By the Court:

Q. What position do you occupy?

A. I am working in the quarry just at the present time. I was braking at this time.

Q. On the shifter?

A. Yes, sir.

By Mr. DEMMING:

Q. That shifting crew was the only shifting crew in this Pen Argyl yard?

A. Yes, sir.

Q. You did all the shifting and shoving of cars there?

A. Once in a while one of the other crews would pick up some loads and take them out of there, but we were the regular yard crew there.

Q. This was one of the regular yard switches or sidings of Albion No. 2?

A. Yes.

Q. How far was this siding from the main line, according to your judgment?

A. I could not say. Probably four or five hundred feet.

Q. There is a quarry right alongside of Albion siding No. 2, is there not?

A. Albion No. 2?

Q. Yes.

A. No, sir; not right by the siding there.

Q. A little back?

A. There is one at the rear end there, and one before you come to Albion.

71 Q. Then there is a dump, a large high dump right alongside the siding?

A. Before you come quite to it.

Q. Then there is a slate quarry alongside of Pen Argyl branch, down near where it leaves the main line, too, is there not?

A. That is between the main line and Albion No. 2.

Q. Between the two?

A. Yes.

Q. And there is another quarry alongside the main line, just before you come to the branch of Pen Argyl, is there not?

A. Yes.

Q. See if that little sketch correctly represents the location of the different quarries and the sidings?

A. That is Albion No. 2?

Q. That is Albion No. 2, here is the main line, here is Pen Argyl branch. This is the West Albion siding, and this is Albion No. 1?

A. Yes; somewhere in that neighborhood.

Q. That is about right, is it?

A. Somewhere near it.

Q. Is it about right?

A. Something like that. I could not say the exact distance of either of them.

Q. On Albion siding No. 2, where you placed these cars, is there a derailing switch, or not?

A. No, sir.

Q. What sort of a switch is there there?

A. Nothing but a switch leading from the main line, or branch.

Q. A regular point switch?

A. Yes, sir.

Q. I believe that is what you call it?

A. Yes, sir.

Q. What is the nearest other siding to Albion siding No. 2?

A. There are two of them. I could not say which one would be the nearest, West Albion or Albion No. 1.

72 Q. West Albion and Albion No. 1, they are both pretty close?

A. Yes.

Q. How far do you think they are away?

A. They are down at the junction along the main line.

Q. And the Pen Argyl branch of course leads to the main line?

A. Yes.

Q. The Albion No. 1 siding, what is it used for?

A. Used for the passing of other trains.

Q. For trains passing each other?

A. Yes, sir.

Q. Is it ever used to deposit cars or stand cars there alone?

A. No, sir.

Q. What is West Albion siding used for?

A. It is a loading track.

Q. Cars are stationed there alone?

A. Yes.

Q. What do you think is the difference in the grade of those two sidings, between Albion No. 1 and West Albion siding? Which has the greater grade, if either one?

A. I should judge West Albion was the heaviest grade.

Q. You think West Albion?

A. Yes, sir.

Q. What sort of switches has West Albion siding?

A. That has a point switch and the derail.

Q. Has it a derail switch on each end?

A. Yes, sir.

Q. When your crew put these cars in—after having taken these cars off Albion No. 1, and putting them back again, how far do you think the nearest car was from the frog of the switch, the nearest car to Pen Argyl branch?

A. I could not tell you the exact distance.

73 Q. Give us your best idea.

A. About 150 or 175 feet, maybe; probably somewhere in that neighborhood.

Q. 150 or 175 feet beyond the frog?

A. Yes.

Q. Do you remember the little stream that goes under Albion siding No. 2?

A. Yes, sir.

Q. Can you remember, with reference to the bridge, or with reference to that stream, how far the last car was from that stream?

A. I could not say. I was not back of them. I was on the head car.

Q. What kind of cars were these?

A. Gondolas.

Q. Do you know the length of them?

A. No; I do not know the exact length of them.

Q. What were they loaded with?

A. Cinders and ashes.

Q. Were they putting in derail switches on different sidings about that time?

(Objected to.)

(Objection overruled.)

A. I saw different ones put in through the summer. I cannot say what time.

Q. They put in different derail switches on different sidings during that summer, did they? Did they put a derail switch at or alongside or near this Albion siding No. 2 from which these cars came?

(Objected to as leading and incompetent.)

By Mr. DEMMING:

Q. Did they put a derail switch at or alongside or near this Albion siding No. 2 from which these cars came at or about the time of the accident—before the accident?

(Objected to as leading.)

(Question withdrawn.)

74 Q. You have said that they were putting in derail switches all this summer, on different sidings?

Mr. CAMPBELL: That is objected to, because the witness has not said so.

Q. What did you say?

A. I said there were several put in, but I could not tell what time during the summer.

Q. During the summer?

A. Yes.

Q. You have said that several derail switches were put in during this summer. With reference to Albion siding No. 2, from which these cars ran away, what do you know with reference to the derailing switches?

Mr. CAMPBELL: Before the accident, I am willing to allow the question. Afterwards, no. I ask him to confine himself as to when, either before the accident or afterwards. If before, I have no objection.

Mr. DEMMING: At or before that time, July 21, 1909.

The COURT: I do not see what that has, at this stage of the case,

to do with it. You do not have to prove that the dead man was not guilty of contributory negligence, nor you do not have to prove affirmatively that he knew that he was working on a railroad that was defective. The presumption, in my judgment, is, that the railroad was supposed to be safe by the people who were working on it, and about it, or who rode on it.

Mr. DEMMING: You Honor rules that out?

The COURT: Yes.

(Exception noted for plaintiff by direction of the Court.)

By Mr. DEMMING:

Q. Did you go back to this siding, Albion siding No. 2, after you heard these cars had run away?

75 A. I went there with my conductor, yes.

Q. Did you see any blocks there?

A. I saw some blocks laying there, yes.

Q. Tell us whether or not any of them had been cut by the cars running over them?

A. Not that I noticed.

Mr. CAMPBELL: I object, unless he confines himself to the blocks under these cars.

By Mr. DEMMING:

Q. Was there any block there that was cut in two?

A. Not to the best of my knowledge that I saw.

Q. Some of these quarries, or at least one of the quarries, is very close to the track. Is not that so?

A. Pretty close to Pen Argyl branch, but it is not up close to Albion No. 2.

Q. Is not there a quarry on Albion siding No. 2—within close proximity to Albion siding No. 2?

A. The one on the back end?

Q. Yes.

A. The dump is, but the hole is not so near.

Q. How about the blasting in that neighborhood? Are not they blasting there continually?

A. They blast there.

Q. In all of those quarries?

A. They all blast, yes, sir.

Q. And when they blast, are not there reverberations and shaking of the ground?

Mr. CAMPBELL: That is objected to as irrelevant, and I ask that it be stricken out.

The COURT: For the present I will overrule your motion.

(Exception noted for defendant by direction of the Court.)

(Question repeated.)

76 A. I could not say. I am not around there enough to know. When we are on the train you would not notice it; you would not notice it on the train, of course.

Cross-examination.

By Mr. CAMPBELL:

Q. Did you help brake these cars when they were put back there on the 20th?

A. Yes. The conductor and I doubled on the first brake.

Q. Did you do anything with the blocks?

A. Put a block under the east side of the head car.

Q. On the east side of the head car?

A. Yes.

Q. Was that brake put on strong on the first car?

A. As strong as the two of us could pull it.

Q. The two of you doubled on the brake and pulled it hard?

A. Yes.

Q. Did you see anybody else braking on that train?

A. I saw Grupe on the hind end working with the brakes back there, coming towards us.

Q. You saw Grupe on the hind end working towards you putting those brakes on?

A. Yes.

Q. You next saw these cars at noon of the same day?

A. Somewhere around noon.

Q. Were they still standing in the same place?

A. Yes.

Q. How long did the cars stand there, do you know, before they ran away?

A. Until the next morning, about half-past seven.

Q. Nearly twenty-four hours?

A. Yes.

Q. Had there been any blasting going on in that time? Do you know?

A. I do not know. I suppose there was, but we did not stay around that switch, after we were through there, we went right on with other work.

77 Q. Did you ever hear of any cars, properly braked, getting away on account of blasting?

(Objected to.)

A. No, sir.

Q. Suppose that there had not been braking by Grupe at all on the last four cars, and it had been braked strongly by you and Mr. Ruch on the first braking, and two blocks put under the first two wheels, would or would not any blast let those cars go away, in your opinion?

(Objected to.)

A. I do not think so. I do not think it would.

Q. You knew there was no derail there, did you not?

A. Yes.

Q. The fact that there was not any was perfectly apparent?

A. Yes, sir.

Q. When a locomotive is putting in a draft of six or more cars in there, what does it do? Describe how it does it.

A. You stop and throw your main frog—the switch, that is, then throw the derail, then shove them in, and we usually hold them with the engine until we get the brakes on, and wait for the crew and pull off, open the derail again, and close the main track switch.

Q. And the locomotive waits then?

A. Yes.

Q. While you brake the cars and put the blocks under them. When you put the cars in, does or does not the locomotive hold right on to them?

A. Yes.

Q. Holds the cars up?

A. Yes.

By Mr. DEMMING:

78 Q. What you said a while ago about blasting not starting the cars is mere supposition on your part, is it not?

A. How is that?

Q. What you said with reference to blasing not starting these cars is mere supposition on your part? You do not know anything about it, do you?

A. I would not judge it would. I could not swear to it, but I would not judge so.

Q. These cars did not go out for some reason, did they not?

A. They went out, yes, sir.

Q. You saw nobody playing with these cars or about the cars, did you?

A. No, sir. I was not around there.

Q. Or at any time after they put them in?

A. No.

By Mr. CAMPBELL:

Q. If two blocks are put under the first two wheels of the car, and the first car was strongly braked by two men, and the four rear cars were braked by the rear brakeman, could these cars get away, unless somebody interfered with the brake?

A. No, sir.

By Mr. DEMMING:

Q. That is another guess, is it not?

A. No, sir. I am positive the brakes would hold it.

Q. Do not the brakes get loose the longer the cars are allowed to stand?

A. No, sir; not as long as the load is left on to them; not as long as the car is loaded.

Q. Do not the brakes get slack even if the cars are loaded or unloaded, if allowed to stand any length of time?

A. I never knew any to.

Q. There were no air-brakes on these cars?

A. No, sir; no air there.

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Q. Only the hand brakes?

A. Yes.

By Mr. CAMPBELL:

Q. Do cars on a siding without any locomotive have the air-brakes at all? Do cars on a siding without a locomotive attached to them have any air-brakes?

A. No.

GEORGE KERN, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Nazareth.

Q. What is your business?

A. Conductor.

Q. For what railroad?

A. Delaware, Lackawanna & Western.

Q. What division are you on?

A. Bangor and Portland.

Q. Were you the conductor of Troxell's car, the man that was killed?

A. Yes, sir.

Q. How long had Troxell been working there?

A. About a year,—that is, steady.

Q. A fireman all that time, was he?

A. Yes, sir.

Q. Do you know how long he has been fireman?

A. About a year, I think.

Q. Won't you tell the Court and jury under what circumstances these cars were first put in on Albion siding No. 2 from which they ran away?

A. Put into the head end switch, to clear the town branch.

Q. I mean why did you put them in?

A. To clear the main line.

Q. Why did you put them on that siding? What happened up there to cause you to put these cars on that siding?

80 A. There was a derailment.

Q. A derailment?

A. Yes.

Q. Tell us where this derailment happened?

A. At Pen Argyl Junction.

Q. You were running on your regular trip, were you?

A. No, sir.

Q. A derailment occurred?

A. Yes.

Q. Tell us how it was that you had put cars in on Albion siding No. 2?

A. We were unloading ashes or cinders that day. We fetched a bunch of four of them, I think it was, from Durbin switch. We fetched four of them from Durbin switch, and one derailed there at

the crossing, about ten or fifteen feet west of the junction, or east of the junction.

Q. One of the cars got thrown?

A. Yes; and in order to get around here, we put them into Albion switch No. 2.

Q. At the time the derailment happened you were running on your regular trip, were you not?

A. No, sir.

Q. What were you doing?

A. Unloading cinders, as a work train.

Q. You were on the main line?

A. Yes.

Q. If it had not been for that derailment you would not have had any occasion to go up to Albion siding No. 2. Is that correct?

A. We may have gone in there, to get out of the way of a passenger train. We may have left them on that siding that night, if we did not get them all unloaded.

Q. But that was the occasion, that was the reason why you had to use Albion siding No. 2?

A. Yes.

81 Q. On that day?

A. Yes.

Q. How many cars were there that you put on to Albion siding No. 2?

A. Six.

Q. What kind of cars were they?

A. Hopper gondolas.

Q. Loaded?

A. Yes.

Q. How?

A. Some of them were loaded even, and some of them were a little more than even.

Q. With ashes?

A. Yes.

Q. When you put those cars in on that Albion siding No. 2, how far do you think the nearest car was from the frog, from the switch?

A. From the frog of the switch?

Q. Yes.

A. About ten feet.

Q. That is to say (using model of switch) this straight line, we will say, is the Pen Argyl branch?

A. Yes.

Q. And this is Albion No. 2?

A. Yes.

Q. From this frog to the nearest car, as your crew put them in on that siding, was, you say, how many feet?

A. About ten feet.

Q. That is, just sufficient to enable a train to clear?

A. A good clearance. You have got to give a good clearance.

Q. About ten feet?

A. Yes.

Q. Of course you were the conductor, and you were on these cars at that time, I suppose. Is that right?

A. What time?

Q. At the time you put them in there?

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A. Yes.

Q. You helped to brake them?

A. Yes.

Q. Where was Troxell, the dead man, at that time, when you put these cars in? I do not mean to say that he was dead then, but I mean the man who was subsequently killed. At the time you put the cars in there, where was he?

A. He was running the engine.

Q. He was running the engine?

A. Yes.

Q. The engineer was off at that time, was he?

A. Yes.

Q. Just temporarily, I suppose?

A. Yes.

Q. Troxell was acting as the engineer?

A. Yes, sir.

Q. Which side of the engine was he on?

A. The right-hand side.

Q. The right-hand side?

A. Yes.

Q. By that you mean, the right-hand side facing the front of the engine?

A. The engine was headed for Bangor that day. I am not certain, though. The engine was headed for Bangor.

Q. Then they backed the cars in on that siding?

A. Shoved the cars in.

Q. But the tender was next to the first car?

A. The tender stuck towards Nazareth. The engine was headed for Albion No. 2 switch.

Q. With the tender towards the main line?

A. Towards the main line.

Q. Troxell was acting as engineer at that time?

A. Yes.

Q. And he did not get off his engine, did he?

A. No. He was on the engine.

83 Q. He had no occasion to get off his engine, or to do anything on the ground with reference to cars or the switches, had he?

A. No; no more than he had to see that they were thrown back.

Q. It was no part of his duty to do any of that himself, was it?

A. No.

Q. When he got the signals from you or the rest of the crew, he went ahead or went back, as the occasion might be?

A. Yes.

Q. Then you left the cars there, did you?

A. Yes, sir.

Q. You went on down to your train?

A. Yes.

Q. And went to Bangor and Nazareth after that—where did you go?

A. We went down to help re-rail that car that was off the track.

Q. You helped to put the car on the main line?

A. Yes.

Q. Where did you go after that?

A. From there we went to Nazareth.

Q. When did you see those cars next?

A. The following morning.

Q. You put these cars in on this siding on Monday. Is that correct?

A. Monday, yes.

Q. That would be the 19th of July?

A. Yes.

Q. The next day is Tuesday, and the accident happened on Wednesday?

A. Yes.

Q. The second day afterwards?

A. Yes.

Q. Did you see these cars between the time you put them in on that siding and the time of the accident?

84 A. I saw them the next morning.

Q. How did you see them?

A. You can see them from the main line.

Q. You did not go up to Pen Argyl branch?

A. No. We were not up there.

Q. What time did you go by there the next morning?

A. Nine o'clock.

Q. Do you know if the yard crew had changed the position of these cars at that time or not?

A. They were not there at that time yet.

Q. The yard crew?

A. No.

Q. They were not there yet?

A. No.

Q. You know the yard crew was not there?

A. No, sir.

Q. You did nothing to those cars between the time you put them on the siding and the time of the accident, did you?

A. No, sir.

Q. At the time of the accident, tell us in your own words what happened, so far as you saw it?

A. Well, I did not see it until it was all over. I was in the caboose.

Q. How many cars had you that morning?

A. Fourteen cars.

Q. Did you ever see the bills and manifests of those cars?

A. Yes.

Q. Who did you turn them in to?

A. It was left at Nazareth, on my return.

Q. With whom?

A. Because I could not get any further.

Q. Who did you leave them with?

A. The agent at Nazareth.

Q. That is, the agent of the Delaware, Lackawanna & Western?

85 A. Yes.

Mr. DEMMING: I call upon the other side I asked them to produce them—for the bills and manifests. I call upon them to produce them. Plaintiff served notice upon counsel for the defendant to produce the way bills and manifests of these cars, and now calls upon them to produce them.

Mr. CAMPBELL: I believe they went to New York, and we are willing to admit anything they contain.

By Mr. DEMMING:

Q. Did you keep a record of those way bills and manifests in your book?

A. I did at some times, but I cannot remember whether I did that day or not.

Mr. CAMPBELL: I want to confine that admission for the purposes of this case only. I assume that Mr. Demming wants to prove something by these way bills and manifests. For this case, I will admit whatever he wants, as to what they contain—for the present case.

By Mr. DEMMING:

Q. What do you call it? The conductor's book or the trainman's book?

A. The train book.

Q. You call it the train book?

A. Yes.

Q. You put in this train book a record of these manifests, so far as showing the destinations of these different cars on this train?

A. Yes.

Q. That you were running that morning?

A. Yes.

Q. Your train book will show that?

A. I do not know whether it will show it in that book or not. We have not been doing that lately, you know, regularly.

86 Q. You do not remember whether you did it that time or not?

A. No.

Q. Who did you turn the train book in to? Who has possession of that?

A. The trainmaster.

Q. That is Howard E. Griffith?

A. Yes.

Q. He is here in court?

A. Yes.

Q. Do you remember the destinations of any of those cars to which they were billed on that train that morning?

A. No, sir.

Q. You do not recall that?

A. No.

Q. You say you were in the caboose when the collision occurred?

A. Yes.

Q. You went forward, I suppose, to see what was the matter?

A. Yes.

Q. Did you recognize these cars then as being the six cars that you put on this siding?

A. Not at first, but after looking around, we took it for that way.

Q. I suppose some of them were mashed to kindling wood, were they not?

A. Yes.

Q. How many were left intact?

A. Four of them.

Q. Two mashed to bits?

A. Yes, sir.

Q. Did you see Troxell's body when it was gotten out?

A. Yes.

Q. He was dead at that time?

A. Yes.

87 Q. How long had you known Troxell on that road?

A. I had known him for six or seven years.

Q. Was he an efficient fireman or not?

Mr. CAMPBELL: That is objected to. That is for the engineer to say.

Mr. DEMMING: The engineer has testified that he was. Will you admit that?

Mr. CAMPBELL: I will admit that he was a faithful fireman.

By Mr. DEMMING:

Q. How long was your line? From Nazareth to where?

A. From Nazareth to East Bangor?

Q. With reference to the sidings on that line of yours, tell us whether or not they are equipped with derailing switches?

Mr. CAMPBELL: That question is objected to as too general. I will admit that Albion siding No. 2 had no derail itself, but I do not want to go over the Lackawanna system, or on the line between Nazareth and Portland.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By Mr. DEMMING:

Q. It is part of a fireman's business, based upon your experience and observation to turn switches, or have anything to do with switches?

A. At times they do it. There is no standard for it.

Q. It is not part of their duty to do it?

A. No, sir.

Q. What sort of a morning was this? What kind of a morning, the morning of the accident? Was the sun shining? Was it a sunny morning, or a rainy morning?

88 A. A clear morning.

Q. Do you know whether or not any derail switches were being put in at the time, at or before the time of this accident anywhere along the line?

Mr. CAMPBELL: That is objected to unless he confines it to around Albion siding No. 2.

(Objection sustained.)

(Exception noted for plaintiff, by direction of the Court.)

Cross-examination.

By Mr. CAMPBELL:

Q. How long had Troxell been on your line?

A. About a year.

Q. During that year did you have any occasion to go into Albion siding No. 2?

A. Yes, sir.

Q. About how often?

A. About once a week, or, on a general average, three days a month, or four.

Q. Did Troxell go in there with his locomotive on any of those trips?

A. Yes, sir; that he was on. If he was working those days, you know.

Q. He was working most of the time, was he not?

A. Yes.

Q. What did he do previous to this year that he was on your locomotive? Do you know?

A. He was a brakeman.

Q. When he was braking the year before, did you ever see him around Albion No. 2?

A. He was an extra, and he would come on my line, out of the Nazareth yard—that is, an extra brakeman.

Q. He had been in Albion No. 2 previously?

A. Yes.

Q. Previous to his employment as fireman?

89 A. Yes.

Q. When you put those cars in there on Monday, Troxell, I understand, was at the throttle of the locomotive?

A. Yes.

Q. When they were braking and blocking, where was his locomotive? Do you remember?

A. Right next to the cinder cars.

Q. Would there have been anything to prevent him from seeing the absence of a derail switch in his position, do you know?

A. No, sir.

Q. Would he have known that there was not a derail there by the different movements that he would make of his locomotive—that is, in having to wait for the derail to be opened and closed?

A. You generally look for it, you know, running an engine, waiting for the signals.

Q. You knew there was no derail there, did you not, on Albion siding No. 2?

A. Yes.

Q. After the collision on the 21st, what did you do after you went up to the locomotive, and found Troxell was hurt or killed? What did you do?

A. We found Troxell first. Then we went to see about the cars and examine the cars, and felt the shoes, to see whether the shoes were hot or the brakes were on yet.

Q. How did you find the brakes and the shoes? Were the brakes in good or bad condition?

A. The brakes?

Q. Yes.

A. The braking staff?

Q. Were the brakes in good, efficient condition?

A. Yes. The brakes were all right.

Q. How were the shoes?

A. The shoes were cold, but the wheels were luke warm.

90 Q. What would that indicate to you?

A. Fast running.

Q. Would it indicate whether or not the brakes had been on during this fast run?

A. No. The shoes would have been hot.

Q. The shoes would have been hot if the brakes were on. Is that the idea?

A. Yes.

Q. And if the brakes were off the shoes would be cold?

A. The shoes would be cold.

Q. You found the shoes cold, I understand?

A. Cold, yes, sir.

Q. (Book shown witness.) Is that the train book that you spoke about in your examination-in-chief, that you handed to the train-master?

A. Yes, sir.

Q. What cars did you have in the train that day—that is, on the 21st, and where were they coming from, and where were they destined?

A. I had three cars there,—one clay, one corn, and four cement for Portland, one flour for Hahns, one rods for Martin's Creek, Pennsylvania, and five cement for Pennsylvania delivery.

Q. By that you mean Pennsylvania Railroad delivery, I suppose?

A. Yes, and one car there, which was gotten at Whitesalls switch.

Q. Do you know where those cars were destined?

A. I was giving you the—

By Mr. DEMMING:

Q. What were you just giving to us?

A. I was giving you the end of our route. The destinations are in the book there.

Q. I was asking for the final destination.

91 A. One car for Chicago, Illinois. One car for Portland, Pennsylvania. One car for Portland, Missouri. One for Waterville, New York. Two for Newark, New Jersey, and one for Hahns switch.

Q. Where is that?

A. That is half way between Belfast and Pen Argyl, one car for Martin's Creek, Pennsylvania, and one car for Givette, Ohio, and one for Danville, Virginia, and one for Elephende, Pennsylvania, one for Richmond, Virginia, and one for Tyrone, Pennsylvania.

By Mr. CAMPBELL:

Q. This was what you had the day you were struck?

A. Yes, sir.

Q. And Troxell was working?

A. Yes, sir.

Mr. DEMMING: At the time he was killed.

By Mr. CAMPBELL:

Q. What did you make these entries from?

A. From the way bills.

Redirect examination.

By Mr. DEMMING:

Q. You have said, in answer to my friend, that the shoes were cold on these four cars?

A. Yes, sir.

Q. How long after the collision did you examine them?

A. About ten minutes.

Q. Did you go right there and examine the shoes at that time?

A. Yes. We went right up front, and looked around the engine, and in the hind end then, to see what had hit us.

Q. If those shoes had been sprung right after the car started to run, they would have been cold just the same?

A. No, hardly.

92 Q. There would not have been any friction?

A. If the brakes were tight when they left Pen Argyl and the cars went on all the way from Pen Argyl, they would not have gotten cold in ten minutes.

Q. Suppose the brakes had sprung shortly after the car started to run, the shoes would have been cold?

A. Yes.

Q. When the cars ran over the point of the switch, as they must have done, there was considerable jar there, was there not, at the point of Albion siding No. 2 on the Pen Argyl branch?

A. No. One car would set it, and that would be all there was to it.

Q. One car would spring it?

A. Yes.

Q. That one car would be jarred?

A. Yes.

Q. The cars were going very fast at the time of the collision, were they not?

A. Yes.

Q. And there must have been more or less vibration as they ran around curves and over other switches all the way down on that run, was there not?

A. Yes, sir.

Q. You say you know there was no derail there?

A. Yes.

Q. And you say your crew got up there three times a month. Is that your answer?

A. Take that on the general average.

Q. Do you remember seeing me in Nazareth? You saw me at Nazareth, or I saw you?

A. Yes.

Q. Did not you tell me up there that Troxell's crew had not been up there for two years before that?

A. Doing drilling in that switch.

Q. That is the switch we are concerned about. Is is not a fact that Troxell's crew had not been up there to that siding, 93 Albion siding No. 2, from which these cars came, for a long period of time, previous to when you put those cars in there?

(Objected to.)

A. No. What I had reference to was that we did not do any grilling there, but we had picked up cars and carried them through. That is what I say, and that averaged three or four times a month.

Q. When you say that averaged three or four times a month, you are estimating that?

A. Yes.

Q. That is your estimate?

A. Yes.

Q. Sometimes when that would be done the engine would be a considerable distance away from the point of the switch?

A. No. We would always cut off ahead, pick them up ahead, or we could not have handled them.

Q. I do not understand what you mean by that answer. Please explain.

A. The cars that had been taken up, there would be two trains, one train would have pulled probably 20 cars to the top of the hill, or 25 cars.

Q. What do you mean by the top of the hill?

A. One train that would go there first would take the train ahead of us, and we would pull in there up around on the other side, and we could handle again as many cars on the other side as would come up there, to Pen Argyl Junction.

Q. Would not that leave the cars simply on the Pen Argyl branch?

A. They would have to clear the Pen Argyl Branch, on account of the main track.

Q. On account of the passenger trains?

A. Yes.

Q. But then if you wanted to take those cars and add them to your train, you could back the rest of your train in there?

A. Yes.

94 Q. And connect them on the rear of your train?

A. You could not handle them by shoving back. You would have to cut off ahead. It depends on what is in there, whether you could handle them.

Q. But it often happened that the engine itself would not get past the point of that switch, did it not?

A. It does depend on what kind of a train we had to get out of there.

Q. You do not mean to tell the court and jury that Troxell himself as fireman would have any occasion to look at that switch and know what kind of a switch it was?

A. At Albion No. 2?

Q. Yes. That would be no part of his duty, would it?

A. I could not say.

By Mr. CAMPBELL:

Q. Would not he know positively that there was no derail switch at Albion No. 2 because the movements of his train would be entirely different? Is not that true?

A. That is it.

Q. That is true?

A. Yes.

Q. And in putting cars in there, he would have to see that the derail switch was fixed to go in?

A. Yes.

Q. And when he went out of there, with cars, he would have to wait until the switch was closed on the derail switch?

A. Yes.

By Mr. DEMMING:

Q. If the derail switch was set so that the cars could run over it, there would be no occasion to stop the locomotive in order to fix it, would there?

A. Yes, you would have to stop the locomotive—

Q. Here is the Pen Argyl branch, and here is Albion siding No. 2? (Indicating.)

95 A. Yes.

Q. The derail switch would be on which side of that siding, this side of that side?

A. It all depends on where they want to ditch the cars?

Q. Suppose that the derail switch was fixed so that the track was perfectly straight,—in other words, the derail switch was not on to derail the cars,—if Troxell's locomotive would push the cars back in there, he would not have any occasion to stop then for the derail switch, would he?

A. He would have to stop to see that the two switches were thrown open, and back out.

Q. If the switch was set, so that the cars could go on, he could put the cars on, and nobody would pay any attention to the derail switch?

A. They would have to see that it was thrown, or go through it.

Q. If the derail switch was set so that the cars could go over the derail switch, nobody would pay any attention to it?

A. Yes, they would have to see that it was thrown. If the derail was not thrown, you would go through it and break it.

Q. Would there be any occasion to throw the derail if it was fixed so that the cars could go over it?

A. Yes. You cannot go over it unless you know it is thrown. You have got to get the signal.

Q. The engineer and fireman get the signal from the brakeman?

A. Yes.

Q. From the conductor?

A. Yes.

Q. It is the duties of the brakeman and conductor to attend to those switches?

A. Yes.

Q. When the switches are properly attended to, you signal the fireman or the engineer?

96 A. You throw one switch first, then walk up and throw the other one, then signal to the engineer.

Q. Unless the fireman is attending to the engine as an engineer, he would not pay any attention to those signals?

A. If he was on the inside of a curve, he would look out for the signal. The conductor could not see the engineer, and the fireman would look out for the signal.

Q. On some occasions he would do that?

A. Yes.

Q. Suppose the fireman was attending to his own duties of firing the engine, is it not the engineer who gets the signal from you or from the brakeman?

A. If he can see us. If not, the fireman will take it and give the engineer the signal.

Q. If he is not attending to his duties?

A. Yes.

Q. And sometimes the engineer comes from one side of the engine to the other in order to get those signals?

A. The fireman does that.

Q. Does not the engineer do that?

A. No.

Q. He always stays on one side?

A. Yes.

By Mr. CAMPBELL:

Q. It is the fireman's duty to receive the signal from the brakeman or conductor?

A. If he is not busy firing.

Q. The derail is open all the time except when you are using the track?

A. Yes.

Q. So that the engineer has to wait until the derail is closed or opened?

A. Yes.

Q. And he knows because it takes more time to do it?

97 A. Yes.

Q. And his fireman is waiting to get the signal from the conductor or the trainman?

A. Yes, and if they are on the inside of a curve, and if he is not working at his fire, he will take the signal and give it to the engineer.

By Mr. DEMMING:

Q. That is no part of his regular duty? His duty is to keep up the fire in the engine.

Mr. CAMPBELL: That is objected to. He has testified that it is part of his duty.

JOHN DUCY, having been duly sworn, was examined as follows:

By Mr. DEMMING:

Q. Where do you live?

A. Pen Argyl.

Q. What is your duty?

A. Section foreman.

Q. On the Delaware, Lackawanna & Western Railroad Company?

A. On the B. & P. Division.

Q. By the B. & P. Division you mean the Bangor and Portland Division?

A. Yes.

Q. Is the Pen Argyl yard on your division?

A. Yes.

Q. How long have you been there?

A. One year the 1st of this April.

Q. Were you a section foreman at the time of this accident, when Troxell was killed?

A. Yes.

Q. You are perfectly familiar of course with this Pen Argyl yard?

A. Yes.

98 Q. Will you tell us about where the top of the grade is on the main line there at the Pen Argyl yard, say with reference to the Pen Argyl branch? Is the top of the grade near where the Pen Argyl branch leaves the main line?

A. No, sir.

Q. Whereabouts is it?

A. The top of the grade is behind the frog on the Pen Argyl branch.

Q. But with reference to the main line, where is the top of the grade?

A. That is more than I could say.

- Q. It is about in there somewheres, is it?
A. I do not know.
Q. Is there a derailing switch on Albion Siding No. 2 from which these cars ran away?
A. No, sir.
Q. Never has been one?
A. No, sir.
Q. That siding is in the same condition today as it was at the time of the accident?
A. Yes.
Q. That siding is used for storage of cars, cars to stand, is it?
A. I do not know what it is used for.
Q. Have you seen cars standing there?
A. I often saw cars in there, yes, sir.
Q. What is the nearest other siding to Albion Siding No. 2?
A. Albion Siding No. 1.
Q. What is that siding used for?
A. A passing track.
Q. You mean by that, one train passes another there?
A. Yes.
Q. Are any cars ever allowed to stand on Albion Siding No. 1? I mean cars by themselves, without a locomotive?
99 A. Sometimes they put them there, but there is always somebody there with them.
Q. To watch them. Has Albion No. 1 any derail switches?
A. No, sir.
Q. West Albion Siding,—that is also very close to Albion Siding No. 2, is it not?
A. Yes.
Q. Is that used as a loading siding also?
A. Yes, sir.
Q. A loading and unloading siding?
A. Yes, sir.
Q. The same as Albion Siding No. 1?
A. Yes.
Q. What kind of switches are on that siding, West Albion Siding?
A. Point switches.
Q. What kind of switches?
A. Point switches.
Q. Any other kind of switches?
A. There were two point switches. That is all.
Q. On West Albion Siding?
A. On West Albion. It can be used the same as No. 1 passing track.
Q. Are there any derail switches on West Albion?
A. Yes.
Q. There are derail switches on West Albion Siding?
A. Yes.
Q. On both ends?
A. Yes.

Q. Tell whether or not that represents the locality there with reference to sidings and the quarries?

A. That is the main line, is it?

Q. Yes.

A. That is the Pen Argyl branch?

Q. Yes.

A. That is the Albion Siding No. 2?

100 Q. Yes.

A. And that is No. 1?

Q. Yes.

A. And that is West Albion?

Q. Yes. That is right, is it not? Here is a quarry and there is a quarry, and there is a quarry, is that right?

A. Yes.

(Referring to sketch marked "Exhibit A" for identification.)

Q. All these sidings that have been spoken about are in your section?

A. Yes.

Q. How many sidings have you altogether in your section?

A. That is really more than I could say. I do not know how many.

Q. Cannot you not give us about how many?

A. 35 or 40, something like that.

Q. Your section covers what part of the road? From where to where?

A. What do you have reference to? The main line? From Ackermanville to Pen Argyl Junction?

Q. How many miles is that?

A. Three and a half or four, perhaps four and a half or five. I do not know how much it is.

Q. About that?

A. Yes.

Q. Tell us how many of those sidings in your section have safety or derail switches.

A. Leading to the main line?

Q. Yes.

Mr. CAMPBELL: I want the question confined to before the accident.

By Mr. DEMMING:

Q. At the time of the accident—before the accident?

101 A. Two.

Q. What sidings were they?

A. There were three of them, the Ackerman siding—

Q. Derail switches?

A. Yes.

Q. What others?

A. West Bangor passing track, and the West Albion.

Q. At or about at the time of the accident, were they engaged in putting derail switches on other sidings?

A. I do not know.

Q. You were along there. Could not you say?

A. I have nothing to do with these sections. I do not know.

Mr. CAMPBELL: That is objected to.

The COURT: He says he has got nothing to do with any of these sections, and he was not engaged himself in putting them on.

By Mr. DEMMING:

Q. Did you observe along the sidings in your sections that they were putting in derail switches at that time? Did you see them put any derail switches before or at the time of the accident, along your section?

A. No, sir. I did not see them put any in.

Q. Did you put in any yourself?

A. I put one in.

Q. Were not they as a matter of fact all that summer, before and at the time of the accident, putting derail switches on several of those sidings?

Mr. CAMPBELL: That is objected to. All that summer refers to after the accident.

The COURT: All that summer would include after this accident.

Q. Were not they putting in derail switches on several of
102 these sidings before the accident? Were they?

A. They put one in. I put in one.

Q. Were other people putting them in also that you saw?

A. I do not know.

Q. You are still employed on the road, are you not?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. If these derails were put in on your section, you would be the man to put them in, would you not?

A. Yes.

Q. Where was this derail put in that you talk about?

A. West Albion, east end.

Q. Then they only put in one derail?

A. Yes.

Q. You talk about the siding at Ackermanville. What sort of a grade does that have?

A. I do not know the grade of it. It goes on to the coal dump.

Q. It is a very high grade, running up to a coal yard, is it not?

A. Yes.

Q. Did you see these cars after they got away?

A. They passed me at Grand Central.

Q. Had you see them before they got away?

A. Yes.

Q. When?

A. On the 20th of the month.

Q. About what time?

A. In the afternoon, when they placed the cars in there.

By Mr. DEMMING:

Q. They put them in there in the afternoon?

103 A. Right after dinner.

Q. You mean the yard crew?

A. No, sir, Mr. Busse put them in, Harry Busse's crew.

Q. Whose crew is that?

A. 699.

By Mr. CAMPBELL:

Q. That was the 19th, was it not? On Monday you saw them put in?

A. Yes.

Q. Did you see them the next day?

A. No, sir.

Q. Do you know whether or not there is a derail on Albion No. 2 switch?

A. No, sir.

By Mr. DEMMING:

Q. When you saw the cars that ran away, that passed you at Grand Central, they were running by themselves, were they not?

A. Yes.

Q. Nothing attached to them. How far is Grand Central from Pen Argyl Junction?

A. About a mile.

Q. How fast were the cars running then?

A. That is more than I could say. Thirty or forty miles per hour.

By the COURT:

Q. Let us understand. This No. 2 Albion switch is on the Pen Argyl branch, is it not?

A. Yes, sir.

Q. How far from Pen Argyl Junction?

A. That is more than I could say.

Q. About?

A. About three or four hundred feet perhaps; maybe it is more.

Q. And these cars ran off No. 2 on to Pen Argyl branch, then out on to the main line?

104 A. Yes.

Q. And went in an easterly direction?

A. West.

Q. They went west?

A. Yes.

By Mr. DEMMING:

Q. Towards Nazareth?

A. Yes.

By the COURT:

Q. How far is the place where they passed you from the junction?

A. About one mile.

Q. And still down grade was it?

A. Yes, sir.

Q. And how far from where they passed you was it that they struck this engine?

A. I do not know how far it was.

Q. About?

A. I cannot say. Four or five miles, maybe.

Q. Four or five?

A. Yes.

Q. Then these cars ran four, five or six miles from the junction to where they hit this engine?

A. Yes, sir.

Q. Is that a double track, the main track?

A. Single.

Q. And Pen Argyl branch is single?

A. Yes, sir.

Q. At what place did they hit the engine?

A. At Whitesall's switch, I think.

By Mr. DEMMING:

Q. Of the two sidings, Albion siding No. 2, and West Albion siding, which you say now has two derail switches, at these two derail switches, of these two sidings, which siding do you think has the greater grade, Albion No. 2 or the West Albion siding?

A. West Albion.

105 Q. You think it has?

A. Yes.

Q. And that has two derailing switches?

A. Yes.

By Mr. CAMPBELL:

Q. Did you ever see any cars run away from Albion No. 2 before?

A. No, sir.

Q. Did you ever hear of any cars running away from any of the other switches?

A. No, sir.

Q. When did you put in this derail on West Albion?

A. After the accident.

By Mr. DEMMING:

Q. How long after the accident?

A. That is more than I could say. Perhaps a month or two months.

Q. About. Very shortly after?

A. About two months after the accident.

Mr. DEMMING: The other side has admitted, for the purposes of this case, and to avoid inconvenience to their officials, that the Dela-

ware, Lackawanna & Western Railroad Company is an interstate road running from the City of Hoboken to Buffalo, through the States of New York, New Jersey and Pennsylvania, and operating the Bangor and Portland line as a merged line of the Delaware, Lackawanna & Western Railroad, and part of its system, and so controlled and operated.

ALFRED WEEKS, having been duly sworn, was examined and testified as follows:

By Mr. DEMMING:

Q. Where do you live?

106 A. Philadelphia.

Q. What is your business?

A. Civil engineer.

Q. You are a graduate of what institution?

A. University of Pennsylvania.

Q. What year?

A. In 1887.

Q. What has been your experience as a civil engineer?

A. I was in the maintenance of way department of the Pennsylvania and Reading Railways, and the Norfolk & Western, and had charge of the construction of the Baltimore & Ohio, and the Wilkes-Barre & Eastern Railroads. Since then I have had considerable private experience on inter-urban roads; not steam roads.

Q. Have you had the construction of any railroad?

A. Yes.

Q. What road is that?

A. I had charge of the bulk of the construction of the Wilkes-Barre & Eastern, running from Wilkes-Barre to Stroudsburg.

Q. A mountain road?

A. Yes.

Q. Have you examined the locality of this accident, as well as the locality from which these cars ran away?

A: I visited Albion No. 2 siding, near around Pen Argyl and walked down the line from there to Belfast, passing the point where I was informed was the scene of the accident.

Q. It was right close to Belfast Junction?

A. Near Belfast Junction.

Q. Some remains of the accident are still there? Burnt parts of the car?

A. Yes, evidence of a freight car having been burned at that point.

Q. What sort of a railroad did you find this particular road?

107 A. It was a single track mountain railroad, and in very good order.

Q. What were the conditions at the point of the collision where these runaway cars ran into the locomotive? A straight track or a curve, with reference to the railroad itself, the physical construction

of the road; what were the conditions at the point of the accident, where the cars—the runaway cars ran into the locomotive?

A. At that point there was a curve running through a cut.

Q. And that was the point from which the cars came, that point towards Pen Argyl?

A. Yes.

Q. Would it have been possible under those conditions for the man on the locomotive, the fireman and engineer to have seen the cars in time to avoid such a collision?

(Objected to as irrelevant.)

(Objection sustained.)

Q. We will come from Belfast Junction, at the point of the collision near Belfast Junction, to Albion siding No. 2, from which these cars came. Just tell us the condition which you found there?

A. At Albion siding No. 2?

Q. Yes. Begin at Albion siding No. 2.

By Mr. CAMPBELL:

Q. When was this?

A. This was last week.

Q. What day?

A. On Saturday.

Mr. DEMMING: It is in evidence that there has been no change of those conditions.

The WITNESS: Albion siding No. 2 runs off of the Pen. Argyl branch, with a short tangent, and then curves to the right.

108 About 100 feet from the frog, the grade is practically level.

From that point it rises with slightly varying grades, an average of one per cent.—that is, a one foot rise in every one hundred feet of track.

Q. You are talking about the siding itself?

A. I am talking about the siding.

By Mr. CAMPBELL:

Q. How far back is that where this grade commences?

A. From the frog?

Q. Yes.

A. Approximately 100 feet.

By Mr. DEMMING:

Q. That is to say, from the point of the frog for 100 feet back on this siding, Albion siding No. 2, from which these cars came, the track is level?

A. Yes.

Q. And then at that point it begins to go up an up grade?

A. Yes.

Q. Did you make any measurements there and plans as a result of those measurements?

A. Yes, I have a blue print of the siding, with a profile of the first 600 feet, and the frog—starting with the frog.

Q. Just hold that up and explain to the court and jury the measurements you made, and how they are shown on that plan.

A. Starting at the frog point—

Q. By "frog point" you mean this point right here?

A. Yes. I measured away from the Pen Argyl branch for 600 feet up the siding, taking elevations at 100 foot points, except at the P. C., which was 145 feet from the frog point. I took an elevation here, which indicated that the level point extended back to a very little over 100 feet, because at 144 it was twenty-five hundredths higher than it was at one hundred.

Q. By "P. C." you mean point of curvature?

A. Point of curve.

Q. Where the curve begins?

A. Where the curve begins.

Q. That upper plan there, represents the ground?

A. Yes, the ground plan.

Q. And the lower one is the profile representing the vertical cut right through it?

A. Yes.

By Mr. DEMMING:

Q. What sort of a grade, as an engineer, would you call that?

A. I call that a very fair grade for a mountain road.

Q. Was there any derailing switch on that siding?

A. There was not.

Q. As an engineer, what is the ordinary and general practice with reference to a siding of that sort?

Mr. CAMPBELL: I object, unless he specifies just exactly on what roads, just exactly what the grades were, just exactly what the financial condition of that company was, and all that detail, because the courts have held time and time again that it is a question for the management of a company, both as to its financial resources, its employees, its grades, its business and everything else, just exactly what they are going to do.

Objection overruled. Exception noted for defendant by direction of the Court.

A. In answer to that question, on similar roads it has been my experience that a switch—a siding, which has a down grade approaching the main line—

Q. Such as this?

A. Yes—is equipped with a derailing switch, particularly so if there is a long descending grade in the same direction, which there is in this case.

Q. You have said so, but perhaps not so as to indicate that; how do you know there is a long descending grade in this case?

A. Because I passed over that line, walked over that line.

Q. You went over it yourself with that very purpose, of ascertaining that?

A. Yes.

Q. You walked from this siding along the same path that these cars took all the way down to the point of collision?

A. Yes, and somewhat beyond.

Q. Is that a descending grade all the way down to that place?

A. It was a descending grade all the way, with varying degrees of grading.

Q. So cars getting away from Albion siding No. 2 would run all that distance?

A. Yes.

Q. That is a distance of about how far?

A. That was approximately six miles.

Q. In going that distance, from Albion Siding No. 2 to the point of collision, how many sidings did you pass leading to the main line?

A. Nine or ten.

Q. On how many of these sidings were there derailing or safety switches?

Objected to. Objection sustained.

Q. You have said for the first 100 feet, as I remember your statement, this track, from the point of the frog, is level?

A. Yes.

Q. You have heard it testified to here by the conductor of Troxell's crew that when that crew put the six loaded cars, gondola,
 111 cars, on that siding, they put them so that the first car here would just clear this branch to Pen Argyl. The conductor has stated that the first car was a distance of ten feet from the point of the frog. Now, that being so, remembering that these were six gondola cars loaded with ashes, as has been testified to here, some of them being heaped up a little and some of them about level with the sides, standing there with the first car, and part of the second car—perhaps all of the second car—on that level track, would or would not those cars in that position, have been likely to run away of themselves?

Mr. CAMPBELL: I object. That question says absolutely nothing as to brakes or blocks or anything.

Mr. DEMMING: Supposing the brakes were on or the brakes off?

Mr. CAMPBELL: Put your question in a definite way.

Mr. DEMMING: This is Troxell's own crew.

Mr. CAMPBELL: Put your hypothetical question.

Mr. DEMMING: I have put it.

Mr. CAMPBELL: I object to it on the ground that it does not state how many cars were braked or how they were blocked.

Mr. DEMMING: There is no testimony that the cars were blocked or braked at all when Troxell's crew put them there.

The COURT: It is very indefinite. I will sustain the objection. If you put it in proper shape, I will let you ask it.

By Mr. DEMMING:

Q. Would cars placed ten feet from the point of the frog, six loaded gondola cars such as these, placed on that siding ten
 112 feet beyond the point of the frog, with the brakes put on or with the brakes not put on, be likely to run away?

Mr. CAMPBELL: I object to that. The witness is testifying as an engineer. He knows about roadbed and things of that kind, not the weight of cars or gravitation or anything of that sort.

Mr. DEMMING: With your Honor's permission, I will recall Kern and ask him what brakes were put on these cars when they were put in there, to get the conditions right.

GEORGE KERN, recalled.

By Mr. DEMMING:

Q. When your crew, Troxell's crew, put these cars on Albion Siding No. 2 on Monday, the 19th of July,—when you say the first car was about ten feet from the point of the frog?

A. About ten feet.

Q. What brakes, if any were put on the cars?

A. They were all put on.

Q. They were all put on?

A. Yes, sir.

Q. Were the wheels blocked also?

A. Yes, sir.

ALBERT WEEKS, recalled.

By Mr. DEMMING:

Q. Now I will put the same question, with this addition; with the brakes on and the wheels blocked.

(Question read to the witness in the following form: "Would cars placed ten feet from the point of the frog, six loaded gondola cars such as these placed on that siding ten feet beyond the point of the frog, with the brakes put on and the wheels blocked, be likely to run away?")

113 A. I would say they would be very unlikely to run away.

Q. Now let us put the six cars back 175 or 180 feet—one witness testified 180 feet at least beyond the point of the switch, and that the switch was 30 feet long from the frog here, and the other witness testified 175 feet from the frog—what would be the likelihood in that case?

Mr. CAMPBELL: With the cars blocked and the brakes on.

Mr. DEMMING: With the brakes on and the wheels blocked.

A. It would not be probable that cars would start under those conditions, but if there was any tendency for them to start, due to any outside shock of any kind, they would be much more likely to get under way at that point than at any other point, because at about 175 to 300 feet back from the frog is the steepest portion of the grade.

Q. And that grade begins 100 feet back from the point of the frog?

A. Yes.

Q. Would the reverberation and shaking of blasts, such as you

yourself heard up there be that sufficient outside cause to start those cars, in your opinion?

Mr. CAMPBELL: I object. This gentleman has not qualified as an expert on jars.

Mr. DEMMING: Such as he heard there.

Mr. CAMPBELL: If it is such as he heard, I will not object.

By the COURT:

Q. Did you hear any shaking of the earth or jarrings from blasts while you were up there?

114 A. There were a couple of blasts shot off, but, in my opinion, the jarring such as I felt then would not have been sufficient to have affected a standing train by itself.

By Mr. DEMMING:

Q. Now we will take the case of cars standing, as these cars did, as was testified here, from 8 o'clock in the morning on Tuesday until about 7.30 o'clock of the next morning, with those brakes set. Would those cars be likely, of themselves, placed 175 feet back from the point of the frog, under those conditions, and blocked and brakes set, to start to go away of themselves, remembering the hour in the morning?

A. No, they would not be likely to.

Q. Could they?

A. Under a variety of conditions, it might be possible. It is necessary to make a hypothetical case.

Q. Describe the conditions under which that could happen?

A. If the rails were wet, if the brakeshoes were worn smooth, and if the chains of the brakes had some spring in them, which would slack off in standing slightly, it might be possible for a very slight shock to start a train moving, under those conditions.

Mr. CAMPBELL: I ask that that answer be stricken out as assuming four or five things not in the case at all.

The COURT: I do not see what the evidence has to do with the case anyhow. What are you trying to prove? How is the evidence relevant?

Mr. DEMMING: In this way: There is absolutely no denial here that these cars ran away. That is the fact. We cannot possibly get away from that. Now there is absolutely nothing to show that the cars were in any way tampered with. It seems to me, therefore, under that condition of affairs, it is perfectly proper, in fact should be proved, that cars could, under certain conditions, left
115 standing like that, run away or start of their own volition to go away. That is the only purpose. We have here different conditions. We have, first, these cars were left standing for about twenty-four hours. We have, second, that they stood over night, and this is in a mountain district, where we all know that there are heavy dews. The dews are on the rails as well as on other parts of the ground. We have also the condition here that there are quarries alongside of the track, not only one, but three, where they are

continuously, from time to time, 'blasting. It certainly seems to me that, under those conditions, I can ask an engineer whether cars could run away or not, if left to stand on that siding.

The COURT: To show what? Negligence?

Mr. DEMMING: To show negligent operation of the road, negligent construction of the road, if, with these conditions existing, they did not, in the face of these conditions, put in a derailing switch on this siding.

Mr. CAMPBELL: I object to this. Several of his witnesses have testified positively that these cars could not have moved unless somebody interfered with the brakes. Your Honor knows what expert testimony is and what opinion testimony is. Under certain circumstances, opinion testimony, or expert testimony, is allowed to take a case to the jury. He now undertakes to bring an expert here to contradict two or three of his own witnesses.

Mr. DEMMING: Not at all. My friend brought that out himself. He insisted on qualifying these men as experts, and they all said they did not know.

Objection sustained. Exception noted for plaintiff by direction of the Court.

116 By Mr. DEMMING:

Q. Is it proper practice to have, on a railroad such as this, a siding connected with the main line without a derailing or safety switch?

Objected to.

The COURT: He has already testified on that.

Mr. DEMMING: Will your Honor let him answer that again, in that form?

The COURT: Yes; but why do you want to repeat evidence?

Mr. DEMMING: Because there is a certain difference.

Objection overruled. Exception noted for defendant by direction of the Court.

A. No; it is not proper.

Cross-examination.

By Mr. CAMPBELL:

Q. What railroads were you ever engaged on that have similar sidings to the Albion No. 2?

A. The Norfolk & Western have very similar ones.

Q. Do you not know that the Norfolk & Western have a number of sidings with a great deal heavier grades than that, or did have, that do not have derailing switches?

A. My experience with the Norfolk & Western goes back about 15 or 18 years, and at that time it was not as common as it has become now.

Q. But you have not been actively engaged with the Norfolk & Western for some years, have you?

A. No.

Q. Give us another case where you have been actively engaged in

railroads of this type, of recent years, where derailing switches are or are not used.

117 A. I was employed by the Union Switch and Signal Company to put in derailing switches on sidings similar to these in most respects.

Q. Yes, but your business then was to encourage the railroad companies to put derailing switches in everywhere, and as many as possible, was it not?

A. I had nothing to do with that. Mine was the construction.

Q. You said, when you got there, "Another derailing switch would not do any harm at the other end of the siding," would you not?

A. Naturally I was not asked any question of the kind.

Q. These six ash cars, on a grade of this kind, were all braked. The first car was double braked; that is, two men doubled on that brake to put it on. Three blocks were put underneath those cars. Can you tell me what on earth could have moved those cars except some outside influence?

A. I cannot tell you, no.

By Mr. DEMMING:

Q. You mean by that you do not know?

A. No, of course.

Mr. DEMMING: I offer this plan in evidence and this little sketch which the witnesses assented to, and I want to use that little switch model afterwards. I do not think it is necessary to offer it in evidence.

Mr. CAMPBELL: I object to this plan, which has been identified in a thousand different ways.

The COURT: I do not think that is a competent draft of the locus in quo. That is rejected.

Counsel for defendant moves for a non-suit.

Motion overruled.

(Adjourned until Tuesday, April 5, 1910, at 10 a. m.)

118

TUESDAY, April 5th, 1910—10 a. m.

Present: Parties as before.

QUINTUS RUCH, heretofore sworn, recalled and examined and testified as follows:

By Mr. CAMPBELL:

Q. You have already been sworn, and you testified in this case yesterday?

A. Yes, sir.

Q. You placed these cars on that Albion No. 2 siding, I believe, on Tuesday, the 20th?

A. Yes, sir.

Q. In order to refresh the recollection of the jury, will you just tell again what you did, how you blocked and braked those cars when you put them in on Tuesday.

A. We had two empty cars to place on the rear end of that switch. There were six cars of ashes on the head end of the switch. So we set these ash cars out on the Pen Argyl branch and put the two cars in on the switch, and then put the six cars back on the switch, and I and the brakeman, on the head car, we doubled on that brake, and the other brakeman put on four. I put on two blocks, and the other brakeman put one block in.

Q. Did you ever hear of cars getting out on that siding before?

A. No, sir.

Q. How could these cars get out when they were braked and blocked in the way you have stated?

A. The only thing, somebody tampering with the cars.

Q. Tampering with the cars or brakes or blocks—which?

A. With the brakes and the blocks.

Q. You went up to that Albion siding again on the 18th
119 of February, didn't you, with some engineers and some ash cars?

A. Yes, sir.

Q. How did you place the ash cars on the 18th of February upon the Albion switch?

A. On the Albion 2?

Q. On Albion No. 2 switch. How did you place them—in the same way that they were on July 20th?

A. The same way, as near as we could get them.

Q. The same as they were on July 20th?

A. Yes, sir.

Q. Some photographs were also taken at that time?

A. Yes, sir.

(No cross-examination.)

JOSEPH KERNS, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. You are employed by the Lackawanna Railroad?

A. Yes, sir.

Q. You were in Troxell's crew, were you not?

A. Yes, sir.

Q. Did you help place those cars in Albion No. 2 switch on July
20th?

A. No, sir.

Q. You were not there at that time?

A. No, sir.

Q. Were you with the crew at the time that Troxell was killed?

A. Yes, sir.

Q. Afterwards did you examine the brakes on the four remaining ash cars?

A. Yes, sir.

Q. Did you examine the brake shoes?

A. Yes, sir.

Q. How were the brakes themselves?

A. The brakes were all off.

Q. Were the brakes in good or bad condition?

A. The brakes were in good condition, those that were left of them.

Q. How were the brake shoes? Did you feel them?

A. The brake shoes were cold.

Q. Would they have been cold if they had been on during this run?

A. No, sir.

Q. Had you ever been up around Albion No. 2 switch with Troxell?

A. Yes, sir.

Q. How many times do you suppose, or how often?

A. Off and on. I don't know how many times. Two or three times a month.

Q. For how many years?

A. A year.

Q. He had been employed as a fireman, I believe, on that engine a year previous to that, and before that he had been a trainman or brakeman?

A. Yes, sir.

Q. Your connection with him was only when he was put on the locomotive?

A. Yes, sir.

Q. Did you know there was no derail there at Albion No. 2?

A. Yes, sir.

Q. Was there any reason why Troxell should not have known there was no derail?

A. I couldn't see why.

Q. It was perfectly obvious and apparent that there was no derail there?

A. Yes, sir.

Q. Anybody could see it?

A. Yes, sir.

121 Q. A year before, when Troxell was a brakeman, didn't you come in contact with him?

A. Oh, yes.

Q. Did he run around Albion No. 2 switch at that time?

A. Not to my knowledge.

Q. You never met him there?

A. No.

Q. You were on another crew at that time?

A. Yes, sir.

Q. Did you ever hear of any cars getting away from Albion No. 2 switch before?

A. No, sir.

Q. You heard Mr. Quintus Ruch testify, didn't you, the conductor in the other crew of the other engine?

A. Yes, sir.

Q. You have heard it described how they braked and blocked those cars in Albion No. 2 switch on Tuesday?

A. Yes, sir.

Q. State, from your experience as a brakeman, whether or not those cars could have gotten away unless somebody interfered with them afterwards?

A. Impossible for them to get away.

Cross-examination.

By Mr. DEMMING:

Q. You say it was impossible for the cars to get away. That is a mere surmise on your part, is it not? You really do not know what caused those cars to get away, do you?

A. They couldn't have got away unless the brakes were off.

Q. You do not know what caused them to get away, do you? It is a mere guess what did start these cars off, is it not? Isn't that true?

A. I don't know what started them off.

122 Q. You do not know whether these cars were braked or not, do you?

A. No, sir.

Q. You say that you were up about that switch with Troxell. When was that—how long before the accident?

A. A year. Off and on.

Q. Could it have been more than a year before the accident?

A. I don't think so.

Q. You are quite sure about that, are you?

A. About what?

Q. About the length of time before the accident?

A. Oh, around a year.

Q. You do not know whether Troxell knew there was no derailing switch there, do you?

A. No, sir.

Q. You could not say as to that?

A. No, sir.

Q. As a matter of fact, the regular crew, only on very rare occasions, went up to that siding? Isn't that so?

A. We went up there two or three times a month.

Q. That is another guess on your part, isn't it?

A. No; it is no guess.

Q. Can you name any month? Can you tell us any month in which they went up on a certain day, if it is not a guess?

A. Every month we went up two or three times.

Mr. CAMPBELL: He has answered that question about ten times, every month two or three times.

By Mr. DEMMING:

Q. You say that is not a guess on your part?

A. No, sir.

Q. What year was it when that happened, when you went up there two or three times a month?

A. The year that Troxell was on.

123 Q. That is, you mean the year previous to July 21st, 1909?

A. Yes, sir.

Q. We will take July 19th. The crew went up then because there was a car derailed on their regular run, and they went up to put these cars out of the road in order to get their train away? That is correct, isn't it?

A. I don't know.

Q. You do not know about that?

A. No.

Q. Previous to July 19th, the day that the crew say they put these cars on this siding, what was the time before that that the crew was up to the siding?

A. I could not name the exact time. But I know we were up in there for cars.

Q. Suppose we take the month of June, before this accident. What day were they up there in June?

A. I don't know. I didn't write them down.

Q. The same way with the other months? You do not know what day they were up there, do you?

A. I do not know what day, no.

Q. You say at the time of the accident, when the collision occurred, that the brake shoes were cold?

A. Yes, sir.

Q. Were the brake shoes in their place?

A. Yes, sir.

Q. By being cold, that indicated to you that there was no friction, or had been no friction, just previous to that, in order to warm them up? Is that the idea?

A. Yes, sir.

Q. If the brakes had been sprung about the time that these cars started to run away, the shoes would have been cold, wouldn't they?

A. If they had been sprung?

Q. Yes. If anything at all had happened to these brakes, so as to keep them from coming in contact with the wheels, they would have been cold?

124 A. If they had been close to the wheels, anywhere against the wheels, they would have been warm.

Q. That was not my question. I say if anything had happened at all near the beginning of the run, or about the time the cars started to run away, so as to keep the shoes away from the wheels they still would have been cold, wouldn't they?

A. Yes, sir.

Q. You say that the brakes were in good condition, and you modified that by saying what was left of them. What was left of them?

A. There were four cars left.

Q. Is that what you mean?

A. Yes, sir.

Q. As to the other cars, you do not know whether they were in good condition or not?

A. No, sir.

Q. Did you examine the dogs and every part of the brakes?

A. Examined all the brakes on the four cars.

Q. It is not a part of the duties of the fireman to attend the switches?

A. No, sir.

Q. Or to put on brakes?

A. No, sir.

Q. That is entirely out of the line of his duty, is it not?

A. Yes, sir.

Redirect examination.

By Mr. CAMPBELL:

Q. The railroad company furnished you with a time-table, didn't it?

A. Yes, sir.

Q. Didn't they furnish every employee on that division with a time-table?

A. Yes, sir.

Q. State whether or not that time-table had a list of the switches that were equipped with derails or not?

A. Yes, sir.

Recross-examination.

By Mr. DEMMING:

Q. Did Troxell have one of these time-tables?

A. He was supposed to have.

Q. You do not know, do you?

A. No, sir.

WATSON B. BRUNNELL, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. Did you take certain photographs of Albion switch and vicinity in February, 1910?

A. I did.

Q. Are these the photographs? (Photographs shown witness.)

A. They are.

By Mr. DEMMING:

Q. When were these taken?

A. They were taken on February 18th, 1910.

Q. There is snow on the ground. That was winter time?

A. Yes, sir.

Q. Conditions are not the same there in the winter as they are in summer, so far as being able to see that switch and see around it, are they?

A. I couldn't see any particular difference, no. Of course, there is snow on the ground. You can see the snow.

Q. The vegetation, the leaves are off the trees, aren't they?

A. Yes, sir.

126 Q. Are any of these photographs taken looking up from the main line—I mean, was the camera placed at the main line in any of these photographs?

A. Yes, sir.

Q. Which one is that?

A. This one.

(Photograph handed Mr. Demming.)

Q. That is the beginning of that siding?

A. Yes, sir.

Q. This is the Pen Argyl branch?

A. Yes, sir.

Mr. DEMMING: I would like to enlighten the jury in every way. I am sorry these photographs were not taken in the summer time. Anything that will help the jury, I am willing to admit.

By Mr. CAMPBELL:

Q. These photographs show all the rails and switches, don't they?

A. Yes, sir.

Q. Then, it would not make any difference whether it was summer time or winter time, would it?

A. I do not see how it could.

Mr. CAMPBELL: I offer these photographs in evidence.

By Mr. DEMMING:

Q. Who put these endorsements on the back?

A. The clerk, I believe, from my notes.

Mr. DEMMING: I would rather have the endorsement put on as they are identified and described from time to time to the jury.

Mr. CAMPBELL: We offer the unendorsed photographs instead of the ones that have typewritten marks on them. I call attention to the jury that all of these photographs are numbered consecutively, commencing with "593-C" and running up to "604-C," both inclusive.

127 By Mr. CAMPBELL:

Q. Starting with photograph 593-C, please explain what that is?

A. This photograph was taken from a point about one hundred feet below the Pen Argyl branch on the main line.

Q. That was taken from the main line?

A. Yes, sir.

Q. The track shooting off to the right is part of the main line, is it not?

A. Yes, sir.

Q. And the one to the left is the Pen Argyl branch?

A. The Pen Argyl branch.

Q. Take photographs 594-C, and explain what that is. Where was your camera placed?

A. 594-C was taken from the point where the man is shown standing in 593-C, looking up the Pen Argyl branch as far as the roadway crossing.

Q. On that photograph you have endorsed, "The camera in this photo was placed on the spot where man was standing as shown in 593-C, and is a continuation of the Pen Argyl branch from that spot. The next photo in this series is 595-C." The endorsement on that is: "A continuation of view of the Pen Argyl branch. Camera in this photo standing where man is shown in 594-C. The track to the right shown in this photo is the Albion No. 2 Switch." Is that correct?

A. Yes, sir. The man was standing in the center of the highway, looking towards Pen Argyl, showing the Albion switch.

Q. 596-C is a continuation of this series, showing the Albion No. 2 switch to the right and the Pen Argyl branch to the left. The camera was standing at the switch, the beginning of which is shown in Photo 595-C. Is that correct?

A. It is.

Q. 597-C is a continuation of the series of photos, showing 128 Albion No. 2 switch, the camera standing where man is shown in photo 595-C. Is that correct?

A. That is correct.

Q. That is simply a photograph of a portion of the Albion No. 2 switch?

A. A continuation from the edge of the woods shown in 595-C and 596-C.

Q. 598-C, which I show you, is endorsed, "Photo shows Albion No. 2 switch, camera placed where man is standing in 597-C." Is that correct?

A. Yes, sir; it is.

Q. 599-C shows Albion switch No. 2 to the stub end, camera placed where man is standing in 598-C. The man in 599-C is standing at foot of slate bank to the right, being the Albion quarry bank? That is correct, is it?

A. Yes, sir; with the exception that it is taken a little bit to one side of the track, in order to show the end of the track.

Q. That shows the stub end of the track?

A. It is taken about eight feet to the left of the man standing in that previous photograph.

Q. That is the end of the switch?

A. Yes, sir.

Q. 600-C photo shows Pen Argyl branch to the left and Albion No. 2 switch to the right, taken at about opposite the switch points shown in 595-C, about ten feet to the right, for the purpose of showing the apparent grade ascending towards the Pen Argyl branch? Is that right?

A. It is.

Q. 601-C is looking down Albion No. 2 switch and Pen Argyl

branch to the main line—that is, looking to the westward, that is towards the main line, is it, from Albion No. 2 switch?

A. Yes, sir. It is looking towards the main line. I do not know the direction of the compass.

Q. I hand you photograph 602-C, showing the Pen Argyl branch and Albion No. 2 switch. That is practically the same photograph as 595-C, except it has the loaded cars of ashes there? Is that correct?

A. It is practically the same. It is taken at a different time, at a different set-up from the other one, on account of running the cars in there. It is practically the same view.

By Mr. DEMMING:

Q. You do not know how far back those cars run from the point of the switch?

A. I do not.

By Mr. CAMPBELL:

Q. I hand you photograph 603-C, being practically the same as photograph 601-C, showing the first car of the loaded cars. That is correct, is it?

A. Yes, sir. It is practically the same as 601-C. This was taken from the Pen Argyl branch, the main branch.

Q. I hand you photograph 604-C, taken from the Pen Argyl branch, and showing cars on Albion No. 2 switch. Is that correct?

A. Yes, sir.

Q. You took that photograph?

A. Yes, sir.

Q. You took all these photographs that have been submitted to you?

A. Yes, sir.

Mr. CAMPBELL: I think it was brought out by Mr. Demming, or it was brought out anyhow, from the witness Ruch, that he placed cars there on February 18, in exactly the same position, as he remembered, that the cars were on July 20th, when he placed them there. So I think that that is already in. The witness testified this morning to that. Therefore, I think the jury is entitled to take these photographs, with the cars on the track, as representing the condition at that time.

130 Cross-examination.

By Mr. DEMMING:

Q. These photographs do not show that path alongside the siding, do they?

A. Not the summer path. I suppose there is tramping in the snow.

Q. You know that there is a path there used by all the workmen of those quarries, don't you?

Mr. CAMPBELL: I object to this, unless the witness' familiarity with the place is shown.

A. I do not know that path.

Q. You are a stranger in that locality?

A. I am. That was my first trip there.

MOSES KELLOW, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. Where do you live?

A. Pen Argyl.

Q. Where are you employed?

A. At the Albion Vein Slate Company.

Q. How long have you been there?

A. It will be two years on the second day of November next.

Q. Where is that quarry situated with respect to the Pen Argyl branch of the Bangor and Portland Division?

A. On the south side of the D. L. & W. Railroad track. It is right opposite the Pen Argyl Junction.

Q. Right near Albion No. 2 switch, that the witnesses have been talking about?

A. Nearer No. 1 than No. 2.

Q. How far from No. 2 would that be?

The COURT: How could that be on the south side?

131 Mr. CAMPBELL: It is on the south side of the Pen Argyl branch.

By the COURT:

Q. It is not on the south side of the main line of the D. L. & W.?

A. It is right opposite the Pen Argyl Junction, south of the main line.

By Mr. DEMMING:

Q. Can you indicate on here where it is? (Sketch marked "A" handed witness.)

A. Yes, sir. Right here. (Indicating.) That is the quarry. Here is Parson's quarry, and here is the old Albion. (Indicating.)

The COURT: Then, it is not up along the branch at all?

Mr. DEMMING: No; it is not up along the branch at all.

By Mr. CAMPBELL:

Q. Did you see these six ash cars that were on Albion No. 2 siding on July 19th and 20th and the morning of the 21st?

A. Yes, sir.

Q. When and how often did you pass them?

A. I passed those cars all the time they were in Albion No. 2 switch. I think it was two or three days. I passed them perhaps eight or nine times.

Q. Before you were with this quarry were you with any other quarry in that vicinity?

A. I was foreman at the old Bangor and J. S. Moyer Slate Company.

Q. What is your position with this Albion quarry?

A. Foreman.

Q. Do you have charge of blasting?

A. Yes, sir.

Q. Can you state whether or not the blasts in the quarries that you have been in there and been connected with, and the
132 other quarries there that you know of, are sufficient to move cars that are braked?

A. No, sir. They wouldn't move them.

By Mr. DEMMING:

Q. Have you had any experience with cars at all?

A. What kind of cars?

Q. Railroad cars.

A. No, sir.

Q. Have you had any experience of putting on or putting off brakes on railroad cars?

A. I never have been employed by a railroad company. I have put brakes on and taken brakes off while loading cars and moving cars, where we had loaded them with slate and millstone.

Q. You do not know what would be a sufficient vibration to start a car, do you? Do you know what would be sufficient to start a car running, what would be required, or shock or blow?

A. No, sir. I couldn't say that.

Mr. DEMMING: I object to this witness being asked as an expert.

By Mr. CAMPBELL:

Q. You have seen lots of railroad cars around the quarries where you have worked, have you not?

A. Yes, sir.

Q. Did you ever know of any of those railroad cars to get loose from any blasting from the quarries that you were connected with?

A. No, sir.

Q. What sort of a vibration is there from a blast?

A. The vibration is in the air, and not on the earth, to amount to anything, in a slate quarry. If you were to charge heavy enough to make a vibration of the earth, then you would destroy your rock. The nature of your rock is not strong enough, and you do not use it as you may use cement, or something of that kind.

133 Cross-examination.

By Mr. DEMMING:

Q. That slate is all under the ground around there, is it not?

A. Yes, sir.

Q. And it is in stratas of rock, the same as other rock, is it not?

A. What other kind of rock?

Q. It is all slate there, is it not?

A. Yes, sir. There is slate rock, and there is the bastard slate rock, and we have a hardened slate rock. We have four different veins of rock right in the neighborhood of Bangor and Pen Argyl.

Q. They are all connected together, are they not?

A. No, sir; they are all separated.

Q. I mean one kind constitutes one vein, and another kind constitutes another vein?

A. Yes, sir. In one sense of the word they are connected, and in another sense of the word they are not connected. They are in grades.

Q. Of course, I understand that it only pays to work certain kinds of this slate?

A. No, sir; I do not mean that. The closer it is to the mountain, the weaker the rock, and the less powder you dare use, and the quicker they fade, the softer they are, there is more carbon there, and they won't stand the handling, neither by the hand nor by explosives.

Q. This is what I am getting at: The rock is all connected; that is, the quarry is opened at one place here, say on slate rock, and on further, a mile or so, there will be another quarry on the same vein practically, won't there?

A. Providing it goes east and west; not north and south. The veins run east and west—northeast. You may say east and west.

Q. Wherever the railroad goes in that region, the veins run under the railroad, don't they?

134 A. Most assuredly.

Q. Is it not a fact that slate rock is a very short distance below the surface of the ground right there at Pen Argyl branch?

A. What would you call a short distance?

Q. What distance is it?

A. It is not workable until it gets down to forty or fifty feet.

Q. But you strike rock before you get down that far, although it is not worth working.

A. As soon as it is solid enough, then it is worth working.

Q. It gets solid at forty or fifty feet?

A. Yes, sir.

Redirect examination.

By Mr. CAMPBELL:

Q. Some of those quarries in that vicinity are three or four hundred feet deep, aren't they—the one you are working?

A. The one I am working is from two hundred and ninety-five to three hundred and ten or fifteen feet deep.

Q. How about the Parsons quarry?

A. That is about three hundred feet, or a little better.

Q. How is the Albion No. 2 quarry, near this switch? How deep is that?

A. In the neighborhood of three hundred.

Recross-examination.

By Mr. DEMMING:

Q. That is Parsons' quarry there, is it not? (Indicating on sketch "A".)

A. Yes, sir.

Q. This is the quarry you are in? (Indicating on sketch).
135 A. Yes, sir.

Q. What do you call that?
A. This is the old Albion.

By the COURT:

Q. You are foreman of the Parsons quarry?
A. No, sir; the Albion vein.
Q. Is that the name of the quarry?
A. Yes, sir.
Q. Where is that located—at the Pen Argyl Junction?
A. Yes, sir; right opposite the Junction.
Q. South of the main line?
A. The edge of our hole is about two hundred and fifty feet south of the track of the main line.
Q. About opposite where the Pen Argyl branch goes into the main line?
A. Yes, sir.
Q. What is the name of that quarry?
A. The Albion vein.
Q. Where do you live?
A. I live in Pen Argyl, Railroad Avenue.
Q. How far is that from the quarry?
A. It takes me twelve minutes to walk it.
Q. How far is it—a mile?
A. No, sir. I wouldn't hardly say it was a mile.
Q. That Pen Argyl branch is not quite a mile long, is it?
A. I wouldn't judge it to be a mile, although I am not able to say the exact length of it. But I wouldn't say it was a mile.

HOWARD E. GRIFFIN, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. You are employed by the Delaware, Lackawanna and Western Railroad Company?
136 A. Yes, sir.
Q. In what capacity?
A. Trainmaster.
Q. What division?
A. Bangor and Portland.
Q. That division has employee's time-tables, does it not?
A. Yes, sir.
Q. State whether that time-table has a list of switches that are furnished with derails?
A. It has.
Q. Did the time-table in effect on July, 1909, and previous thereto, have such a statement?
A. Yes, sir.
Q. Did you know Mr. Troxell, the deceased?
A. Yes, sir.

Q. Do you know whether or not he was furnished with such a time-table?

A. He was.

Q. What is this time-table for, other than telling the time of the trains?

A. It states the rules and schedules of the trains, and so forth.

Q. Everything for the instruction of the employees of that division?

A. Yes, sir.

Q. Do you know, of your own knowledge, how long Troxell worked for the company?

A. In the neighborhood of two years.

Q. Do you know what he was paid during that time or by the month or week?

A. A fair average would be about fifty-five or sixty dollars a month.

Q. How are your firemen paid?

A. By the day.

Q. Just for the day's work?

A. They get so much for ten or twelve hours, whatever the rate may be, and then so much overtime.

137 Q. Is there always steady work for them?

A. Not always, no, sir.

Q. Have you got the time slips so as you can be able to tell us what Troxell was making during say the last year, when he was a fireman?

A. Yes, sir.

Q. Kindly state what that was. Have you figured it out from the time-slips, just exactly what Troxell made?

A. Yes, sir.

Q. Kindly state what that was. What is that statement?

A. \$1,720.35.

Q. For what period?

A. Thirty months.

Q. He was off, then, part of the time?

A. Yes, sir.

Q. The average that makes is only \$33.91 a month. Have you got a record of what he made in the months he was actually working?

A. I have it here, yes, sir.

Q. Let us have that, for the last year.

A. The last year, 1909?

Q. Yes. While he was fireman, previous to his death?

A. January, 1909, \$48.09.

Q. State in October, 1907, when he started as a fireman.

A. October, 1907, \$11.34.

By Mr. DEMMING:

Q. Is that when he started as a fireman?

A. Yes, sir.

Q. October, 1907?

A. Yes, sir.

Q. Then he was a fireman longer than a year?

A. Yes, sir.

Q. Nearly two years?

A. Yes, sir. November, \$62.58; December, \$62.79; January, 1908, \$61.95; February, \$34.65; March, \$58.80; April, \$72.87; May, \$68.88; June, \$60.27; July, \$57.54; August, \$62.58; September, \$70.35; October, \$65.94; November, \$55.65; December, \$60.90; January, 1909, \$48.09; February, \$51.45; March, \$73.08; April, \$67.62; May, \$59.64; June, \$60.27; July, \$34.86.

By the COURT:

Q. What is that total, in what number of months?

A. I figured it as thirty months that he was in the service, all told.

Q. What is the average?

A. I figured that it averaged \$57.34.

Mr. CAMPBELL: While he was a fireman on the railroad. Of course, he was off part of the time, or his average would only be \$34 a month for the total time. But, as a fireman he averaged just as he says, \$55 a month.

The WITNESS: Fireman and trainman.

By Mr. CAMPBELL:

Q. How long have you been railroading?

A. Ten years.

Q. Were you present at Albion No. 2 switch on February 18th, 1910, when certain experiments were made with six loaded ash cars?

A. Yes, sir.

Q. Kindly state in your own way just what experiments you made, and what the cars did, and the conditions.

A. The cars were placed in there like they were before the accident, and we found that two brakes and a block held the cars all right.

Q. Did you try it with the block alone?

A. We tried them with the block alone, too.

Q. Did one block alone hold the cars?

A. Yes, sir.

Q. Without any brakes at all?

A. Yes, sir.

139 Cross-examination.

By Mr. DEMMING:

Q. You do not know how those cars were placed in at the time of the accident, do you?

A. I do not, no, sir.

Q. You were not there?

A. At the time of the accident?

Q. Yes.

A. What do you mean by the accident? What accident?

Q. Don't you know what this case is about?

A. I do, yes.

Q. You know these cars ran away on the morning of the 21st of July, 1909?

A. Yes, sir.

Q. That is the only accident we are concerned about. You were not there that morning, were you?

A. Where?

Q. At Albion siding No. 2?

A. No, sir.

Q. You do not know whether the brakes were on those cars or blocks under the wheels or not, do you?

A. No, sir.

Q. When you tried this so-called experiment, what was done? How many cars had you?

A. Six.

Q. Six gondola cars?

A. Yes, sir.

Q. What were in the cars?

A. Ashes.

Q. Heaped up?

A. They were loaded full, yes, sir.

Q. How full were they loaded?

A. I couldn't tell you that. They were loaded with ashes, full.

Q. How far back from the point of the switch were they placed?

A. About the same place as they were before.

140 Q. How do you know that?

A. I was there when it was put in in the first place.

Q. When the cars were put in that ran away?

A. Yes, sir.

Q. On the 19th of July?

A. Yes, sir.

Q. You were there?

A. Yes, sir.

Q. Then were you there on the 20th of July, too?

A. No, sir.

Q. You were in this court room yesterday while the case was being tried, were you not?

A. I was, yes, sir.

Q. Didn't you hear the yard crew say that they took them out and put them back further up the switch?

A. I did.

Q. Which do you mean? Where were those cars placed the day you made this experiment?

A. On Albion No. 2.

Q. Were they placed ten feet back from the point of the switch?

A. They were probably placed a hundred feet.

Q. You do not know how far back they were, do you?

A. I don't know the exact measurement, no, sir.

Q. You are coming here and telling us that you tried an experiment with six loaded ash cars?

Mr. CAMPBELL: I object to this. The positive testimony of the crew that took them out on the 20th and put them back again is here, and the conductor said that they put them there on February 18th in exactly the identical place where they were. This man was not there. What is the use of wasting time on cross-examination of this kind, when it is testified positively by the people who know all about it.

141 Mr. DEMMING: He said they tried an experiment. I have a perfect right to cross-examine this man as to how they tried this experiment.

By Mr. DEMMING:

Q. You do not know how far back from the point of the switch they were placed, do you?

A. About a hundred feet, I should judge.

Q. You heard it testified here that these six cars that ran away were placed one hundred and seventy-five feet back from the point of the switch?

A. You cannot hear very good back there.

Q. I beg your pardon. That is the testimony.

A. I do not know what is the testimony. I say I did not hear it.

The COURT: He hasn't anything to do with the cars that ran away. All that he knows about is the cars that he experimented with.

Mr. DEMMING: I just wanted to know under what circumstances they experimented, and the conditions.

By Mr. DEMMING:

Q. The cars that you experimented with, then, were placed a hundred feet back?

A. As near as I can say.

Q. About that?

A. Yes, sir.

Q. You say the brakes were put on and blocks were put under the wheels?

A. Yes, sir.

Q. How long were these cars allowed to stand there?

A. In the switch?

Q. Yes. Those that you experimented with.

A. Possibly ten minutes.

Q. You did it right away, didn't you?

A. Yes, sir.

142 Q. With regard to the earnings of Mr. Troxell. You have read here a list by the month. My only purpose is to get at the correctness of this list. What are your sources of information on that? Where did you get that list?

A. Out of the time book.

Q. Who keeps the time book?

A. The chief clerk, at Easton.

Q. Are you connected with that office?

A. I am, yes, sir.

Q. In what capacity?

A. I help make up the pay-rolls.

Q. Did you keep that time book?

A. No, sir.

Q. You do not know anything about how much money he got, do you, of your own knowledge?

A. The figures show.

Q. You figured from those figures that were given to you?

A. No. I took the figures off the time book myself.

Q. But you did not keep the time book?

A. I did not, no, sir.

Q. Is the clerk who kept that time book here?

A. No.

Q. How was that time book kept?

A. What do you mean?

Q. You say the clerk kept that time book. Where did he get his figures?

A. Off the time slips.

Q. Who gave him the time slips?

A. The conductor of the train.

Q. You did not see those time slips, did you?

A. Yes, sir. I have them here.

Q. Were those time slips up in that office at Easton?

A. Yes, sir.

Q. And the clerk gave them to you?

A. Yes, sir.

143 Q. You do not know whether they were the time slips that were handed in or not. You only have the clerk's word for that?

A. Yes, sir. They are the original time slips.

Q. I say you do not know of your own knowledge, do you?

A. Why, yes.

Q. How do you know?

A. Why shouldn't they be?

Q. Were you there when these time slips came in?

A. I O. K. the time slips myself,—see that they are correct.

Q. Do you mean to say that you recognize your O. K. on each of these time slips?

A. Yes, sir. I have a stamp.

Q. It is a stamp.

A. Yes, sir.

Q. Is there anything on those time slips in your own handwriting?

A. No, sir.

Q. Simply a rubber stamp?

A. Yes, sir.

Q. You gave us a total of \$1,720.35 for thirty months. Is that correct?

A. I figured that up in the back room. I suggest that somebody else figure it over.

Q. If you did the figuring yourself, I am not disputing the figur-

ing. We will take that up afterwards. I want to get at how you arrived at that calculation. Did that cover the entire time he was working as a fireman?

A. Fireman and trainman, both.

Q. You began with October of 1907?

A. September, 1906.

Q. That was when he was a trainman?

A. Yes, sir.

Q. Come down now to the time when he was a fireman, because you will acknowledge yourself that it is hardly fair to average
144 a man's pay from the time he was a trainman. He got more when he was a fireman, didn't he?

A. The same pay.

Q. Then, come down to the time that he was a fireman. When did he first become a fireman?

A. October, 1907.

Q. Have you got the total for those months beginning with October, 1907, until the time he was killed?

A. I gave you that.

Q. What is that total?

A. I did not total it up.

Q. Won't you total it up for the time he was a fireman?

A. I can, yes, if I take the time to do it.

Q. Give us the average of that divided by the months. Pardon me. Was there any time lost after that, October, 1907? You said something about time being lost in that calculation.

A. He might have been off a day, and he would divide up the time that he lost with the other fireman. That is what he lost by lost time. He may have been sick.

Q. You said there was some time out in this calculation. Was that while he was a trainman or after he became a fireman?

A. When he was fireman.

Q. Average it up and give us the total after he became a fireman.

A. The amounts here will show you that the only months he lost time was when he started work, in October, and February. February is a short month, and we don't work. Our business is not very heavy.

By Mr. CAMPBELL:

Q. Was it from April, 1907, to October, 1907, when he was a trainman?

A. Yes, sir.

By Mr. DEMMING:

Q. I see you have here for October \$11.34?

145 A. That is when he started to work, the latter part of October.

Q. You do not mean that he was paid for the whole month of October that?

A. We pay them by the day.

Q. This does not show how many days he worked in October?

A. I can give it. I have the time slips here.

Q. How much was he paid by the day in 1907?

A. In 1907 I think their rate was \$2.10, as near as I can recollect.

Q. What was the rate per day at the time he was killed, in July, 1909?

A. \$2.30.

Q. You said something a while ago about that not showing when he would average up the pay with some other member of his crew.

A. No. I said divide up the time with the other fireman. For instance, we have seven crews. If we have not enough work for seven crews tomorrow, we will lay one crew off? Possibly Troxell lost two or three days a month.

Q. What would happen then? What indication would you have on there of that?

A. He wouldn't draw as much money as if he worked every day.

Q. That would be a voluntary act on his part?

A. Oh, no.

Q. You would lay him off?

A. Yes, sir. He would not work if we didn't have anything to do for him.

Q. Does that total show overtime you paid him?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Would you O. K. that overtime, too?

A. I would, yes, sir.

146 Q. Those amounts that you have there, are you positive that they indicate the checks that would be paid to this man at the end of each month?

A. I am, yes, sir.

Q. Those were the amounts?

A. Yes, sir.

Q. Who would make those checks out?

A. Mr. Bessell, at Scranton.

Q. What is his position?

A. General paymaster.

Q. He would make them out from what?

A. From the pay-roll.

Q. He would not make them out from that paper you have there?

A. Oh, no. I took this from the time book. The pay-rolls are made up from the time book.

Q. Troxell, then, had been a fireman from October, 1907, up to the time of the accident, hadn't he?

A. Yes, sir.

Q. That is considerably over a year, is it not?

A. Yes, sir.

Q. In fact, it is nearer two years than one year?

A. Yes, sir.

Q. You think that Troxell had a time-table showing the list of derailing switches?

A. I don't think so. I know that he did have.

Q. How do you know that?

A. I hold his receipt.

Q. You hold his receipt for a time-table?

A. The time-table that was in effect at the time of the accident.

Q. Did you give him the time-table?

A. The engineer gave it to him.

Q. How do you know the engineer gave it to him?

A. He told me so.

Q. The engineer told you?

A. Yes, sir.

Q. Then, all you know about it is hearsay knowledge? You never saw it in Troxell's possession, did you?

147 A. I did, yes, sir.

Q. Where?

A. Out on the road.

Q. On what occasion?

A. The trainmaster's duties are to be out on the road, and as a rule he asks the men if they have time-tables.

Q. I am not asking you about your duties. I ask you what days you saw them?

A. I couldn't tell you what day.

Q. What place was it?

A. It was on an engine.

Q. Near what town?

A. Probably around Bangor.

Q. Probably?

A. Yes, sir.

Q. You have got a very vague recollection about it, haven't you?

A. I know that he had a time-table.

Q. Where in these time-tables was there a derailing switch shown?

A. I have the time-table here that shows.

Q. Let me see it.

(Time-table produced and handed Mr. Demming.)

Q. When was that time-table issued?

A. May 29th, 1909. That is when it took effect. It went into effect May 29th, 1909.

Q. That was when they were printed or issued?

A. That is when they went into effect.

Q. When were they issued to employees?

A. I couldn't tell you that. Possibly a couple of days before they went into effect, or three or four days.

Q. You do not know positively about that?

A. No.

Q. When did you get Troxell's receipt for it?

A. Before he went to work under the new time-table. I couldn't tell you what date it was.

- 148 Q. Have you got the receipt here for it?
A. Not here, no, sir. I have it in the office.
- Q. Why didn't you bring it down?
A. I didn't think it was necessary.
- Q. You were not asked to bring that down?
A. No, sir.
- Q. Do you know the date of that receipt?
A. No, sir.
- Q. May 29th would be about a month and a half before this accident, wouldn't it?
A. Yes, sir.
- Q. That shows, does it not, that there were derailing switches on all the other sidings at Pen Argyl?
A. On some of the other sidings, yes, sir.
- Q. With the exception of Albion No. 1, what other siding hasn't got a derailing switch?
A. There are a number in the Pen Argyl territory that haven't got a derail.
- Q. With the exception of No. 1 and Albion No. 2, on which these cars moved, what other one?
A. The Town switch has no derail.
- Q. Have you got a list there of those having derails at Pan Argyl?
A. I have.
- Q. How many? Eleven or twelve, aren't there?
A. Seven.
- Q. Some of them have two derails?
A. They have, yes, sir.
- Q. One at each end?
A. Yes, sir.
- Q. Some of those others that you say have no derails are sidings which are down grade from the main line, are they not?
A. They don't require a derail. They are stub switches.
- Q. They don't need a derail because the grade is away from the main line? That is right, isn't it?
A. What is right?
- 149 Q. The grade is away from the main line?
A. What switches do you refer to?
- Q. I am speaking about the other sidings at Pen Argyl that have no derailing switches. You say they don't require derailing switches?
A. That is right.
- Q. They don't require derailing switches there because the grade is away from the main line? Isn't that right?
- Mr. CAMPBELL: He is going into the subject of derails at other places. It is not cross-examination at all. I did not go into anything of the kind. I simply asked him if he had a time-table which had a list of the switches that were furnished with derails. Now he is going into the question of derails on all the other switches on the line.
- The Court: The point is to cross-examine him on the matters upon which he has been examined in chief.

Mr. DEMMING: I think I have a right to an answer to that question.

The COURT: He has not given any testimony about derailing switches.

Mr. DEMMING: Not at all, but he has testified about other derailing switches at Pen Argyl.

The COURT: No. He simply produced a time-table, and he said that the time-table gave a list of derailing switches. That does not entitle you to cross-examine about a matter that he did not testify about. You may cross-examine him about that time-table, whether it is a time-table of the road, and when it was gotten up.

Mr. DEMMING: I have done that.

150 Redirect examination.

By Mr. CAMPBELL:

Q. You say that you saw these cars when they were put on the siding on July 19th?

A. Yes, sir.

Q. Were they loaded practically the same way when the tests were made on February 18th?

A. The same class of cars.

Mr. DEMMING: He is going all over this again.

Mr. CAMPBELL: This was brought out on cross-examination—it did not come out in chief at all—that he saw these cars when they were on the siding on July 19th. That did not come out in chief at all. Now I am going to ask him, and I have asked him, whether those cars were not loaded on July 19th the same as they were on February 18th, when the tests were made. I am entitled to ask that.

Mr. DEMMING: There is no dispute about that. He has already answered that question.

By Mr. CAMPBELL:

Q. How were they loaded on February 18th, with respect to the way they were loaded on July 19th?

A. The same way, as near as I could say.

Q. Could Troxell have worked as a fireman if he did not have one of these time-tables?

A. No, sir.

Mr. CAMPBELL: I offer this time-table, produced by the witness, in evidence.

Mr. DEMMING: Does your Honor think that time-table is admissible as evidence. This man has not produced any receipt here showing that Troxell got it.

The COURT: What is the object of offering it in evidence?

151 Mr. CAMPBELL: This is a document which gives a list of all the derails. I offer it for that purpose only, as showing that Albion No. 2 switch at that time had no derail.

Mr. DEMMING: That has been proved time and time again.

Mr. CAMPBELL: That is the purpose of it.

Mr. DEMMING: For that purpose alone?

Mr. CAMPBELL: For that purpose alone.

By Mr. CAMPBELL:

Q. Was that time-table in effect on July 21st, 1909?

A. Yes, sir.

WILLIAM GROUPE, heretofore sworn, recalled and examined and testified as follows:

By Mr. CAMPBELL:

Q. You were one of the crew that put these cars in on July 20th?

A. Yes, sir; I was.

Q. You are a brakeman?

A. Yes, sir.

Q. Did you brake any of these cars?

A. Yes, sir.

Q. What cars did you brake?

A. The four rear cars.

Q. On February 18th were you present at West Albion switch when these experiments were made?

A. Yes, sir.

Q. How were the cars placed in there to be photographed and for the experiment?

A. About the same as we had them in before, as near as I could tell.

Q. How were the cars loaded?

A. About the same as the others were before.

(No cross-examination.)

152 Mr. CAMPBELL: I have a lot of testimony of that same kind, as to the position of the cars, but I do not think it is material.

WILLIAM SWEENEY, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. What is your business?

A. Trainmaster for the Central Railroad of New Jersey.

Q. Whereabouts?

A. On the Lehigh and Susquehanna Division, Mauch Chunk.

Q. How long have you been railroading?

A. Twenty-six years.

Q. All the time with the Jersey Central?

A. Yes, sir.

Q. Did you ever work for the Lackawanna?

A. No, sir.

Q. Were you present at West Albion switch near Pen Argyl on February 18th last, when certain experiments were made with six cars?

A. Yes, sir.

Q. Will you kindly state in your own way just what experiments were made, and what was done?

A. There were six cars of ashes, if I remember rightly, pushed into a switch on the right-hand side of the main track, as I understood it, and after the engine was cut loose, the cars were left there to see if they would start. Those cars did not start. Each brake was taken off until the last brake was taken off, and a block remaining, and the cars still stood there.

Q. Was the last brake taken off?

A. All the brakes were taken off those cars.

Q. And only one block remained?

A. Only one block. Now, I think there were two. I am not so sure.

153 Q. Suppose that four brakes were on the rear cars, one brake on the front car, and three blocks were used, would or would not those cars move out from that siding?

A. If the brakes were properly set, and good brakes, I do not think they would move out of there.

Q. You don't think. Can't you state whether or not they would?

A. From the conditions, I think they would not move out of there.

Q. Could they move out of there unless somebody tampered with them?

A. No, sir. It would be impossible for them to move out.

Q. Suppose the first car was double-braked, and two blocks put under it, and the other brakes were not put on at all. Would or would not those cars move?

A. From the test, and from the conditions, they would hardly move out of there.

Q. Hardly move out. Would they move out?

A. I don't think they would.

Q. They couldn't move out unless somebody tampered with the brakes, could they?

A. Unless somebody started them.

Q. You testify that from your knowledge of railroading and switches?

A. Yes, sir.

Q. The testimony here is, as I said before, that the brakes on the four rear cars were put on, the brakes were all in good condition, and the first car was double-braked, and there were two blocks under the first car and one under the second. I ask you again to state positively to the jury how could those cars get out of there if they were thus braked and blocked?

A. The only way that those cars could get out of there is by somebody releasing the brakes on the rear cars and starting them over those blocks.

Q. Would any blasting in the vicinity have any effect on cars thus braked and blocked?

154 A. I don't think so.

Q. Would it?

A. No; I don't think it would.

Q. You say you don't think. Can't you tell us positively whether it would or not?

A. I couldn't tell you positively, because it would depend entirely upon the nature of the blasting. If there was an earthquake or something of that sort, they would surely move.

Q. With the blasting such as you have on the Jersey Central, in coal mines and quarries, and things of that kind, would that make cars move that were braked on a switch like that?

A. Blasting on coal mines would not, unless it was very close to the surface, and then, of course, the surface goes down, and the cars would go down also.

Q. They would go down the mines, and not down the track?

A. In the mines.

Cross-examination.

By Mr. DEMMING:

Q. Were any blasts set off while you were there? Did you hear any blasts while you were there?

A. I don't remember. I don't remember that I did hear any blasting.

Q. No blasts went off while you were conducting this experiment?

A. I don't think so.

Q. How far back was the first car from the point of the switch when you conducted this experiment?

A. I should say not over twenty or twenty-five feet. It was clear of the main line, a good clearance; possibly about twenty or thirty feet—that is, from the frog.

Q. From the point of the frog?

A. Yes, sir.

155 Q. That would leave one or two of those cars, at least, on what looks like a sag in that photograph, but which has been testified to was really a level track, wouldn't it if it was only about twenty or twenty-five feet back from the point of the frog? (Photograph shown witness.)

A. That is about all the further it was back.

Q. Did you notice that, that that would leave one or two of the cars, and possibly even the third car—

A. I did not notice there was any sag there.

Q. Didn't you notice that?

A. No. I couldn't tell. A track is very deceiving.

Q. You recognize that as a photograph of the place?

A. Yes, sir.

Q. It certainly looks that way there?

A. You can't always tell by a photograph.

Q. Did you hear the engineer testify here?

A. I could not hear very well back there.

Q. The engineer testified that that was practically a level track there.

A. I don't know anything about that. I couldn't tell you anything about that.

Q. As a matter of fact, there are brakes and brakes, are there not? One brake is a very good brake, and another brake is not nearly as good, and will not hold nearly as well, will it?

A. The same is true of everything.

Q. You do not know what kind of brakes, or how well they held, that were on these cars that were in there on July 21st, 1909?

A. No, sir.

Q. And you do not know how far back those cars were placed from the point of the switch, whether they were on the steep part of this siding or on the level part, do you, on the day of the accident?

A. No, sir.

156 F. B. PARRY, having been duly sworn, was examined and testified as follows:

By Mr. CAMPBELL:

Q. What is your business?

A. Trainmaster.

Q. What railroad?

A. Lehigh Valley.

Q. How long have you been such?

A. About three years.

Q. How long have you been railroading?

A. Twenty-three years.

Q. Were you present at Albion No. 2 switch on February 18th last, when certain experiments were made?

A. Yes, sir.

Q. Describe in your own way just what experiments were made.

A. Six cars of ashes were placed on this siding by the engine and the brakes applied, and the engine cut away, and the brakes were released one after another.

Q. What held the cars at last?

A. A block.

Q. One block?

A. Yes, sir.

Q. Without any brakes at all?

A. Without any brakes at all, yes, sir.

Q. Suppose, as has been testified in this case, that the first car was double-braked, two blocks put under it, and a block put under the second car, and the last four cars were braked by a big, strong man, and they stood there for twenty-three hours without moving, could you tell us what would let those cars get away?

A. I don't think there is anything except pulling the blocks away from the cars and releasing the brakes.

Q. You say you don't think. Can't you tell us positively what would let them go?

A. That is the only thing that would let them go.

157 Cross-examination.

By Mr. DEMMING:

Q. As a matter of fact, you do not know what did let those cars go, do you, on July 21st?

A. Not those particular cars, no, sir.

Q. You noticed the close proximity of those quarries to this siding?

A. Yes, sir.

Q. Did you notice those heavy blasts sometimes?

A. Yes, sir; I have noticed them.

Q. You have noticed?

A. Yes, sir.

Q. Did you at that time, at the time of the experiment?

A. No; I did not.

Q. When the cars that you experimented with were put in there, they were only allowed to stand there a very few minutes, were they not?

A. Yes, sir.

Q. After a brake is set for twenty-four hours, there is some little give in it, is there not?

A. Not very much, no?

Q. There is a little?

A. A trifle, yes.

Q. At the end of the twenty-four hours it does not hold quite as well as it does at the time it is first put on, does it?

A. There is not a great deal of difference.

Q. There is some difference, is there not?

A. Yes; slightly.

Q. Did you notice the grade on that siding?

A. Yes. I looked at it while we were there.

Mr. CAMPBELL: This is not proper cross-examination. There was nothing said about grades at all to this witness. I object to it.

By Mr. DEMMING:

158 Q. With a siding such as that on the Lehigh Valley, would or would not the proper practice be to have a derailing switch?

Mr. CAMPBELL: I object. This is absolutely irrelevant. We have not gone into that question at all in chief. We have not called him for that purpose at all.

Mr. DEMMING: They had these gentlemen all observe this experiment, and I am asking him whether, in the face of such an experiment, the proper practice would not be to have a derailing switch on such a siding.

The COURT: You can call him back as your witness.

Defendant closes.

Testimony closed.

Mr. DEMMING: Before I go to the jury, I understand that the case is being tried on the ordinary principles of negligence. That is the understanding, is it not? That is to say, the statement of claim is

drawn, of course, in accordance with the Act of April 22d, 1908, but so far as the interstate commerce part of the case is concerned, the plaintiff waives that part of it, with your Honor's permission, and goes to the jury on the ordinary principles of negligence.

At 1 p. m. Court took a recess until 2 p. m.

PHILADELPHIA, PA., TUESDAY, April 5, 1910—2 p. m.

Charge of the Court.

HON. JAMES B. HOLLAND, J.:

159 GENTLEMEN OF THE JURY: This is a suit instituted to re-
cover damages against the Delaware, Lackawanna and West-
ern Railroad Company, a corporation organized under the
laws of the State of Pennsylvania, by Lizzie M. Troxell, the widow of
Joseph Daniel Troxell, caused by the defendant's failure to supply
proper appliances in the construction of its railroad, as a result of
which he received injuries which resulted in his death. In the state-
ment Lizzie M. Troxell is the plaintiff. She is a citizen of the State
of New Jersey. She is bringing suit under an Act of the State of
Pennsylvania, which authorizes the widow to institute suit to recover
damages for the death of her husband. In her statement she has
alleged that this defendant company is a railroad engaged in inter-
state commerce, and that at the time her husband was killed that
train and the crew on that train were engaged in interstate commerce.
This is all true. There is no dispute about it. It is conceded by the
defendant to be the fact.

In 1908 Congress enacted a law called the Employers' Liability
Act. That Act was passed by Congress for the purpose of, to some
extent, fixing the liability of railroads to their employees who were
injured while engaged in their work on railroads engaged in inter-
state commerce. The defendant in this case contends that, where
the facts show that the injured party was working on a railroad en-
gaged in interstate commerce, and at the time of this injury his crew
was engaged in interstate commerce and was hauling interstate com-
merce on their train, under those circumstances the national Act is
paramount to any State law on the subject, and that an injured party
must recover under the Act of Congress, and that the provisions of
that Act require the suit to be instituted by a representative of the
decedent—that is, somebody legally authorized—and, as Lizzie M.
Troxell instituted suit in her individual capacity, and not as admin-
istratrix of her husband, who was killed, that therefore this suit is
160 improperly brought and cannot be maintained. That I say,
is the contention of the defendant. If it be true that the na-
tional Act excludes all other acts, and that Lizzie M. Troxell
has brought suit in her own name instead of in the name of an ad-
ministrator of her deceased husband, this suit could not be main-
tained; but, for the purposes of this case, gentlemen of the jury, I in-
struct you that that is not the law, but that there is concurrent juris-

diction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce.

There are some facts in this case that are not disputed, which are important in the consideration of the principal issue involved. It appears from the evidence that the defendant company is operating or is responsible for the operation of a road running from Nazareth, in Pennsylvania, east to Portland, Pennsylvania, and near a place called Pen Argyl there is a spur branching off from this railroad in a northeasterly direction and runs from what is called Pen Argyl Junction northeasterly about a mile to a place called Pen Argyl. Between the point where it branches off from the Main Line, running east and west, to Pen Argyl terminus, there are a number of switches, and about a hundred or a hundred and fifty yards northeast from the junction there is one switch called Albion Switch No. 2. This Albion Switch No. 2 is thrown off from the Pen Argyl spur to the right, going northeast, and extends some distance around to accommodate the quarries and businesses in that vicinity. That switch is, according to the evidence, and evidence which is not contradicted, constructed so that for the first hundred feet from where it branches

off of the Pen Argyl spur, running northeast, it is level, and
161 then it rises with a grade of one per cent.—one foot in a hundred—back to the northeastern end. And, it appears from the evidence, and a number of witnesses have so testified, that from the switch where it connects with the Pen Argyl spur, out to the main track, and then on westward on the main track for at least three or four or probably, as some said, as much as five miles, near where the accident occurred, or within a mile or a half a mile of where the accident occurred, there is a down grade, and the evidence shows, without contradiction, that six cars—gondola cars, some call them—about thirty-six feet long, considering the entire length of the car, loaded with ashes, which had been placed in on that switch the night before by the yard shifter, and the day before that by the train crew in which the decedent worked,—about half past seven, or some time along there, on the morning of July 21st, 1909, were seen by the section boss some distance west of the junction running rapidly down grade toward the point where the collision occurred, some four, five or more miles west of the Pen Argyl Junction. The decedent, Joseph Daniel Troxell, was a fireman engaged in firing the engine that was pulling a train going eastward, and the train was going through a cut around a bend, and they were unable to see or know that these cars were pitching down this descent at the speed at which they were coming until they were so near that there was no chance, or, at any rate, nobody gave any signal. The fireman, the decedent, was working on his tender, not knowing that the cars were coming, and they struck the

engine and he was buried under the wreck which resulted in the loss of his life.

Those are the facts. The defendant says that it is not liable for his death, because it is the law that when a man engages to work for a railroad company, or for any other concern, individual or corporation, that he contracts to take the risk of all ordinary danger incident to the employment in which he is about to
162 engage. This is true, gentlemen of the jury. The law says that he takes the risk. It is contended that it is based upon

contract, that the man, when he hires himself, takes that into consideration. Whether he does or does not, whether it is a theory or a figment of imagination, or a real fact, we have nothing to do with that—that is the law. He is presumed to take that into consideration when he is hiring, and he does, and must, take all the ordinary risks incident to his employment. But, while he is doing that, the law upon the other side requires that his employer shall furnish him reasonably safe tools and appliances with which to work, a safe place to work, and the appliances and tools must be reasonably safe. No railroad company is required to have the very latest and the very best inventions and improvements that everybody may assert are better than what they are using. That would be an impossible rule to which to hold railroad companies engaged in the business of transportation. All they are required to do is to keep their road, their rolling stock, and their appliances in a reasonably safe condition. What is reasonably and ordinarily safe in the appliances and roadbed, and so forth, is the rule to which they are required to conform, and if they have done that, and somebody is injured, it is one of those dangers incident to his employment. When we talk about safe appliances, safe surroundings and safe tools, which the law requires the employer to furnish, that is a relative term. For instance, we would say that the law required a farmer to furnish a reasonably safe place for his men to work, and reasonably safe instruments for them to use, and he may send men out to plough with the ordinary appliances. There is very little danger in that. Another man may be employed in a powder mill. That employer must furnish a safe place for his employees to work, too, as safe as it is ordinarily possible to furnish in a powder mill. In other words, a man cannot engage you to work

163 with dynamite and furnish you as safe a place to work in as though he put you to build a lawn tennis court. It is a relative matter, and when you go and hire yourself upon a railroad, the employer is required to furnish you with safe appliances and a safe place to work, as safe as the conduct of that business will permit, with the ordinary and usual appliances which are used on railroads in conducting their business. Now, the defendant contends that it has done that. The plaintiff says that the defendant has failed to do that; that it constructed this railroad there at a grade, ran a spur off toward Pen Argyl and threw in a switch at a grade, which, while level for the first hundred feet, rose at the rate of one per cent., or one foot to the hundred, and that on that switch they put loaded cars, and that that switch led out to the Pen Argyl spur

down to the main line, and for a number of miles—you will recollect the testimony—there was quite a down-grade, which made it dangerous for the operation of that road in that condition. The plaintiff says that was a dangerous condition at that point, in the construction of the road and in the surroundings and the use of it, and it was negligence on the part of the defendant, which caused this man's death. It is very plain that there is no fault on the part of this man. He did nothing, so far as the evidence shows, and unless his representative is prevented from recovering because of some rule of law, there does not seem to be, from the evidence, anything that he did himself that was wrong; he was not guilty of negligence or any act of omission on his part.

Now, gentlemen of the jury, the Court leaves to you the question whether or not, under all the circumstances of the case, this was such a construction and surrounding and use on that part of the defendant's property as amounted to negligence, for which they were responsible. If it was an improper construction, if they should

164 have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible. Of course, as has been urged by the defendant, if the plaintiff, or the person claiming damages, knows of a danger existing as well as his employer, and after he has knowledge of it he goes ahead, then he cannot recover. If you are employed and your employer says to you, "Here is a broken monkey wrench. Go on and perform that work with it the best you can," and you take that broken instrument and start to perform the work, and you are injured because of that defective wrench, you cannot recover, because you took the chance. But an employee has a right to assume that his employer has constructed his plant or his machinery and his appliances in accordance with a condition that is ordinarily safe. It is insisted that the decedent knew the construction of the switch, and raised no objections, but a fireman cannot be allowed by any objections he may make to require the company to change the construction of its switch or roadbed. An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to in-

165 sist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make,

and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on. And, in a given case, such as this, if it is ascertained, as contended by the plaintiff, that the company has failed to do so, then it would be responsible. If, in this given case, as contended by the defendant, the company has done so, then the company would not be responsible, and it would be your duty to say so.

Now, gentlemen of the jury, you will take the facts of the case and say whether or not, under all the circumstances, the company was negligent in permitting that situation there so that cars, if left unbraked or becoming unbraked on the siding, could run out and injure an employee, as these did. Was that a negligent act? If it was, the defendant is responsible.

The next question, then, for you is what amount of damages you will award the plaintiff. It is not like a case of a man who has been injured and is here himself as the plaintiff. Then he would be entitled, if the defendant was responsible at all, to compensation for the loss of what he could have earned, what he would earn in the future if permanently injured, what he had expended, what he might expend if he was still injured, and for pain and suffering, and so on. But, with the plaintiff here who is the widow of the decedent, she is only entitled to such a sum, if the defendant is at all responsible, as will compensate her for the money loss of her husband. What did she lose in money by reason of the death of her husband? You will take into consideration his age—he was twenty-three years of age; his condition of health, and his earning capacity. It does not appear that he was other than a healthy man. He was a fireman, a competent fireman, it is admitted, and he was making on an average of from fifty to fifty-seven dollars 166 a month. That is what he earned. How much of that would naturally go to her for the support of herself and her children? How long would he live? What would be his probable life to work and support her? Upon these facts as a basis of calculation, gentlemen of the jury, you will award such sum to the plaintiff as you think will compensate her, if you find the defendant is at all liable.

I have been requested on behalf of the defendant to charge you upon certain points.

First. "You are instructed, that the fact of an accident to an employee, raises no presumption of negligence against the railroad company, and the burden of proof is upon the plaintiff to prove negligence."

That is true.

Second. "You are instructed that it is not sufficient for the plaintiff to prove that the defendant may have been guilty of negligence, the evidence must point to the fact that it was, and where the testimony shows that several things may have brought about the injury, for some of which the defendant was responsible, and for some of which it was not, then you cannot guess between them, and if

you should find from the evidence that such is the case here, your verdict should be for the defendant."

That is true.

Third. "You are instructed that the defendant was not bound to insure the absolute safety of machinery or mechanical appliances which it provided for the use of its employees. Nor is it bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. All that is required is to provide what is reasonably safe and suitable for the purpose."

That is true.

Fourth. "You are instructed that the defendant is obliged only to exercise ordinary care in furnishing its employees with a reasonably safe place to work."

That is true.

167 Fifth. "You are instructed that the defendant was only bound to furnish *his* servants with such means and appliances as are suitable for doing the work in which he was employed, and reasonably necessary for the servant's safety. Such means, however, need not be the safest or newest that can be or have been devised. It is sufficient if they are reasonably safe."

That is true.

Sixth. "Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

The mere absence of a derailing device at the Albion Switch is not negligence. That is true. That is, the fact of its absence alone does not establish negligence. The next proposition, "or a fact from which negligence can be inferred," is true. It cannot be inferred, from that fact alone, but you may take that fact into consideration, together with the surrounding circumstances, in arriving at the question as to whether it was negligence.

Seventh. "You are instructed that railroad companies have the right to exercise reasonable judgment and discretion in the construction of their road beds, rails and safety appliances."

That is true.

Eighth. "You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, it need not guarantee that it is absolutely safe."

That is true.

Ninth. "You are instructed that defendant is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery, or apparatus which may be provided for the use of its employees."

That is true.

168 Tenth. "You are instructed that defendant's duty to its servants, in respect to appliances, is sufficiently discharged by providing those that are reasonably safe and fit, and if you find from the evidence that that was done in this case, your verdict should be for the defendant."

That is true.

Eleventh. "If you find from the evidence that decedent Troxell

knew that there was no derailling device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

This, gentlemen of the jury, would be true, if Troxell knew that there was no derailling switch there, and also that the danger which befell him was obvious to him—that is, so plain that he could know that at almost any time loaded cars might run out of there on to the main track and kill him. If he knew that, and it was obvious to him, he could not recover if he took the chances and continued. But, did he know it? Could he know it? Was he an expert in the constructing and building of a railroad? Did he know what might occur from that situation? As I say, he had a right to assume it was properly done, and if he knew that it was not properly done and that it might result in damage, then of course he took the chances and he could not recover.

Twelfth. "You are instructed that the law is that when a servant in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself."

That is true.

Thirteenth. "If you find from the evidence that the decedent Troxell knew of the absence of this derailling device and the danger from it was obvious to him, then he assumed what ever risk that there might be from its absence and your verdict should be for the defendant."

That is true.

Fourteenth. "You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

That is true.

Fifteenth. "You are instructed that the decedent Troxell by entering and continuing in the employment of the defendant, assumed the risks and dangers of the employment which he knew and appreciated and those which an ordinarily prudent and careful person of his capacity and intelligence would have known and appreciated in his situation."

That is true.

Sixteenth. "You are instructed that an employee cannot be heard to say that he did not appreciate or realize the danger where the defects were obvious and the dangers would have been apparent to an ordinarily prudent person of his intelligence and experience in his situation."

That is true.

Seventeenth. "You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to

exercise ordinary care to furnish the servant with a reasonably safe place to work."

That is not true.

170 Eighteenth. "You are instructed that an employee assumes the risk or injury from defective appliances when the defect is known or plainly observable by him."

That is true.

Nineteenth. "You are instructed that when a servant enters into an employment that is hazardous, he assumes the usual risks of the service, and when he continues in the service, with knowledge of the dangers to be incurred, he also assumes the hazard incident to the situation."

That is true.

Twentieth. "You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to the defendant, he assumed the risk of all the dangers incident thereto."

That is true. These are propositions that come very close, gentlemen of the jury, most of them, to one side or the other. Take that one, for instance, "You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to the defendant, he assumed the risk of all the dangers incident thereto." You cannot tell, or at least I cannot tell, just exactly what is meant, whether it means for the Court to instruct you that if the decedent Troxell, knew of the absence of the derailing device, and he also knew that the absence of the derailing device made it dangerous, and made it dangerous in the way that it resulted to him, and he comprehended the whole situation, and, notwithstanding that, he went on, that he would have assumed that risk. I would say that that is true. But if he knew the derailing device was not there, and if this point means for me to say to you that it was dangerous, and that it does not mean that I should instruct you that he should have known that it
171 was dangerous, that he cannot recover, it would not be true.

In other words, unless he knew of the danger, whether it was dangerous or not, he would not be prevented from recovering.

21st. "You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of the defective condition and continued to expose himself to it."

That is another proposition that is rather indefinite. If Troxell knew the whole situation, knew of the danger that was lurking there, and kept on, he could not recover. But if he knew there was a derailing switch lacking, and, in a general way, he knew that that was an improper construction, it was not his right to require a different construction. Nor was he required first to notify the Company that there was no derailing switch there, to enable him or his representatives to recover for an injury resulting by reason of this defective construction, if it was such a defective construction, or such a construction as was unusual and improper under the circumstances.

22nd. "You are instructed that a servant assumes all such risks arising from his employment, as he knew, or, in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto, he cannot recover from the master for injuries received from such patent risks."

Wherever a risk is patent, plain and obvious, of course he cannot recover if he takes the chances.

23rd. "You are instructed that the risks which an employee assumes from his knowledge thereof, are not affected by the rapidity or promptness with which he may be required to act at the time of the accident."

This is sort of an academic proposition. It is true, but it has not much to do with this case.

172 24th. "You are instructed that if you should find a verdict for plaintiff that it must only be a compensatory one, free from any claim the decedent Troxell himself might have had, if he had only been injured and brought suit against defendant."

That is true.

25th. "If you should find for the plaintiff your verdict must be confined to what she actually lost by reason of the untimely death of her husband, based upon the probability of his living; his earning power; his chances for continuing in steady employment; chances of sickness or death, and what he would have left out of his earnings for the support of plaintiff and her children."

That is true.

26th. "If you find from the evidence that the cars were sufficiently braked and blocked so that they could not possibly drift to the main track, without the wanton or criminal acts of some person or persons, then you are instructed that your verdict must be for the defendant."

That is true. If some wanton or criminal act of someone did it, the company is not responsible for that.

27th. "You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligence or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

There is no evidence that the negligent act of some outsider did contribute towards this injury.

28th. "You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

That is not true.

173 29th. "The decedent Troxell was guilty of contributory negligence, and your verdict should be for the defendant."

That is not true.

30th. "The decedent Troxell assumed the risk of defendant's negligence, and your verdict should be for the defendant."

That is not true.

31st. "If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory

or foreign country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

That is not true.

32nd. "Under all the evidence your verdict should be for the defendant."

I refuse to so instruct you.

Gentlemen of the jury, you may retire and consider the case.

Mr. DEMMING: Your Honor forgot to mention the funeral expenses. There is positive testimony here that they were one hundred and ninety-eight dollars and twenty-eight cents.

The COURT: Gentlemen of the jury, if you find that this defendant is liable at all to the plaintiff, she would be entitled, in addition to the compensation for the loss of her husband, to the amount she paid for funeral expenses in burying her husband.

Mr. DEMMING: I ask for an exception to your Honor's affirmance of the defendant's second, fourteenth and twenty-sixth points.

(Exception noted for plaintiff by direction of the Court.)

174 Mr. CAMPBELL: I ask for an exception to your Honor's refusal and qualification of the sixth, eight, eleventh, thirteenth, fourteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first and thirty-second points.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: I would also ask an exception as to your Honor's instructions to the jury that there is concurrent jurisdiction in the State Courts and the United States Courts.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor also said that there were some facts in the case which were undisputed. My contention is that there are no facts undisputed. I would ask an exception to that.

(Exception noted for defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor also said that the grade after it started from level was one per cent. The testimony, I think, of the engineer was that it was only 25-100, and the testimony of the engineer of Troxell's train was that there was an up-grade for half a mile before the cars ran into him. I would ask an exception to that part of your Honor's charge.

(Exception noted for the defendant by direction of the court.)

Mr. CAMPBELL: Your Honor also said several witnesses testified as to the necessity of a derail switch there. The only testimony upon that point at all was this engineer, Mr. Weeks. That is the only testimony at all that a derail should be at that point.

Mr. DEMMING: Some of the other witnesses intimated that very strongly.

175 Mr. CAMPBELL: No; not at all. I would ask an exception to that.

(Exception noted for the defendant by direction of the Court.)

Mr. CAMPBELL: Your Honor has not defined negligence under the circumstances, to the jury.

The COURT: Gentlemen of the jury. Of course the ordinary

definition of negligence is absence of ordinary and reasonable care under the circumstances, but the question here is whether or not the defendant is liable upon the ground that it constructed a railroad spur and switches and operated them in such a way that it amounted to negligence, and that the railway construction, together with its operation, was negligent—that is, a lack of the ordinary care under all the circumstances.

Mr. CAMPBELL: Your Honor will grant me an exception to your last remarks as to negligence?

(Exception noted for defendant by direction of the Court.)

Defendant's counsel requested the learned Judge to direct the stenographer to reduce the notes of testimony and charge to type-writing, and file the same of record in the cause, which request was granted, and the stenographer so directed.

The jury rendered a verdict in favor of the plaintiff for \$7,698.28.

The foregoing notes of testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof, and the charge with the exceptions thereto have been examined by me and are hereby approved and ordered to be filed.

JAMES B. HOLLAND, *Judge*.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record,

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge, at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided. this 20th day of April, A. D. 1910.

[SEAL.]

JAMES B. HOLLAND, *Judge*.

177 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Motion and Reasons for New Trial.

Filed Apr. 9, 1910.

And now, April 9th, 1910, the defendant, by James F. Campbell, its Attorney, moves the Court for a new trial, and in support of its said motion, files the following reasons:

The learned Judge erred in overruling the defendant's objection to the following question- (page 14 of testimony).

"By Mr. DEMMING:

Q. You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the Court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

178 Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

Mr. CAMPBELL: I will object, for the reason that the proper way to prove that is to call for the checks.

(Objection over-ruled.)

(Page 15 of testimony:)

(Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. About eighty-five dollars."

2. The learned Judge erred in overruling defendant's objection to the following question: (Page 75 of testimony).

"Q. And when they blast, are not there reverberations and shaking of the ground?

Mr. CAMPBELL: That is objected to as irrelevant; and I ask that it be stricken out.

The COURT: For the present I will overrule your motion.

(Exception noted for the defendant by direction of the court.)

(Question repeated.)

179 A. I could not say. I am not around there enough to know. When we are on the train you would not notice it; you would not notice it on the train, of course."

3. The learned Judge erred in overruling defendant's objection to the following question: (Page 109 of testimony.)

"Q. As an engineer, what is the ordinary and general practice with reference to a siding of that sort?

Mr. CAMPBELL: I object, unless he specifies just exactly on what roads just exactly what the grades were, just exactly what the financial condition of that company was, and all that detail, because the Courts have held time and time again that it is a question for the management of a company, both as to its financial resources, its employees, its grades, its business and everything else, just exactly what they are going to do.

Objection overruled. Exception noted for defendant by direction of the Court.

A. In answer to that question on similar roads it has been my experience that a switch—a siding, which has a down grade approaching the main line——

Q. Such as this?

A. Yes—is equipped with a derailing switch, particularly so if there is a long descending grade in the same direction which there is in this case.

Q. You have said so, but perhaps not so as to indicate that; how do you know there is a long descending grade in this case?

A. Because I passed over that line, walked over that line.

Q. You went over it yourself with that very purpose, of ascertaining that?

A. Yes."

180 4. The learned Judge erred in overruling defendant's objection to the following question: (Page 116 of testimony.)

"By Mr. DEMMING:

Q. Is it proper practice to have on a railroad such as this, a siding connected with the main line without a derailing or safety switch?

Objected to.

The COURT: He has already testified on that.

Mr. DEMMING: Will your Honor let him answer that again, in that form?

The COURT: Yes, but why do you want to repeat evidence?

Mr. DEMMING: Because there is a certain difference.

Objection overruled. Exception noted for defendant by direction of the Court.

A. No, it is not proper."

5. The learned Judge erred in his remarks to the jury in qualifying defendant's Sixth point for charge, which was as follows:

"Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

6. The learned Judge erred in refusing to charge the jury upon defendant's Eighth point, which was as follows:

"You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, he need not guarantee that it is absolutely safe."

7. The learned Judge erred in refusing to charge the jury upon defendant's Eleventh point, which was as follows:

181 "If you find from the evidence that decedent Troxell knew that there was no derailing device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

8. The learned Judge erred in his remarks to the jury in qualifying defendant's Thirteenth point, which was as follows:

"If you find from the evidence that the decedent Troxell knew of the absence of this derailing device and the danger from it was obvious to him, then he assumed whatever risk that there might be from its absence and your verdict should be for the defendant."

9. The learned Judge erred in refusing to charge the jury upon defendant's Fourteenth point, which was as follows:

"You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

19. The learned Judge erred in refusing defendant's Seventeenth point, which was as follows:

"You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work."

182 11. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twentieth point, which was as follows:

"You are instructed that if the decedent Troxell knew of the absence of the derailing device, and its absence was dangerous, without giving any notice thereof to defendant, he assumed the risk of all the dangers incident thereto."

12. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-first point, which was as follows:

"You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of the defective condition and continued to expose himself to it."

13. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-second point, which was as follows:

"You are instructed that a servant assumes all such risks arising from his employment, as he knew, or, in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto, he cannot recover from the master for injuries received from such patent risks."

14. The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-third point, which was as follows:

"You are instructed that the risks which an employee assumes from his knowledge thereof are not affected by the rapidity or

promptness with which he may be required to act at the time of the accident."

15. The learned Judge erred in his remarks to the jury in
183 the qualification of defendant's Twenty-seventh point, which was as follows:

"You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligence or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

16. The learned Judge erred in refusing defendant's Twenty-eighth point, which was as follows:

"You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

17. The learned Judge erred in refusing defendant's Twenty-ninth point, which was as follows:

"The decedent Troxell was guilty of contributory negligence and your verdict should be for the defendant."

18. The learned Judge erred in refusing defendant's Thirtieth point, which was as follows:

"The decedent Troxell assumed the risk of defendant's negligence and your verdict should be for the defendant."

19. The learned Judge erred in refusing defendant's Thirty-first point, which was as follows:

"If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory, or Foreign Country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

184 20. The learned Judge erred in refusing defendant's Thirty-second point, which was as follows:

"Under all the evidence your verdict should be for the defendant."

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY
COMPANY.

Motion for Judgment Non Obstante Veredicto.

Filed Apr. 9, 1910.

And now, April 9th, 1910, the defendant by its Attorney, James F. Campbell, moves the Court to have all the evidence taken upon the

trial duly certified and filed so as to become part of the Record and for judgment non obstante veredicto upon the whole Record.

At the trial the following point for binding instructions was refused:

"Under all the evidence, your verdict should be for the defendant."

JAMES F. CAMPBELL,
Attorney for Defendant.

185 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VE.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Additional Reasons in Support of Motion for a New Trial.

Filed Apr. 11, 1910.

21. The learned Judge erred in his charge to the jury in saying on pages 159, 160:

"If it be true that the national Act excludes all other acts, and that Lizzie M. Troxell has brought suit in her own name instead of in the name of an *administrator* of her deceased husband, this suit could not be maintained; but, for the purposes of this case, gentlemen of the jury, I instruct you that that is not the law, but that there is concurrent jurisdiction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce."

186 22. The learned Judge erred in stating to the jury on page 160:

"There are some facts in this case that are not disputed, which are important in the consideration of the principal issue involved."

23. The learned Judge erred in saying in his charge to the jury at page 163:

"The plaintiff says that the defendant has failed to do that; that it constructed this railroad there at a grade, ran a spur off towards Pen Argyl and threw in a switch at a grade, which, while level for the first hundred feet, rose at the rate of one per cent. or one foot to the hundred." * * *

24. The learned Judge erred in his charge to the jury in saying, pages 163-164 of testimony:

"If it was an improper construction, if they should have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible."

25. The learned Judge erred in his charge to the jury in saying, pages 164-165 of testimony:

"An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to insist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make, and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on."

26. The learned Judge erred in defining negligence, by saying, page 175:

"Gentlemen of the Jury, of course the ordinary definition of negligence is absence of ordinary and reasonable care under the circumstances, but the question here is whether or not the defendant is liable upon the ground that it constructed a railroad spur and switches and operated them in such a way that it amounted to negligence, and that the railway construction, together with its operation, was negligent—that is, a lack of the ordinary care under the circumstances."

27. The verdict was excessive.

28. The verdict was against the law.

29. The verdict was against the evidence.

30. The verdict was against the charge of the Court.

Respectfully submitted,

JAMES F. CAMPBELL,
Attorney for Defendant.

188 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Opinion.

Filed Aug. 6, 1910.

HOLLAND, J.:

This action is brought by Lizzie M. Troxell, a resident of the State of New Jersey, against the defendant, a corporation organized under the laws of the State of Pennsylvania; the plaintiff suing as the widow of Joseph D. Troxell, on behalf of herself and minor children, to recover damages for the alleged wrongful death of her husband, who was an employee of the defendant company. The case was tried in this court on April 4th, and 5th, 1910, and a verdict rendered by the jury in favor of the plaintiff for \$7,698.28; whereupon a motion and thirty reasons for a new trial were filed, together with a motion for judgment non obstante veredicto. This latter motion will be first considered.

The defendant's right to move the court for the entry of such an order in its favor arises out of the Pennsylvania Practice Act of 22d of April, 1905, P. L. 286, which is followed in the Federal Courts in this State. *Fries-Breslin Co. vs. Bergen et al.*, 168 Fed. 189 360 and 176 Fed. 76. The important part of this Act provides, "that whenever, upon the trial of any issue, a point requesting binding instruction has been reserved; the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become a part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to have certified the evidence, and to enter such judgment as should have been entered upon that evidence &c."

At the trial the defendant submitted the following point for binding instructions: "Under all the evidence your verdict should be for the defendant." The court declined to so instruct the jury, and it is upon this action of the court that the motion for judgment non obstante veredicto is based.

The defendant's contention now is, upon this motion, that upon all the evidence in the cause it was the duty of the court, as a matter of law, to have instructed the jury to render a verdict in its favor, for the reasons:

1. That this action should have been brought by the personal rep-

representative of the decedent under the Federal Employers' Liability Act of April 22nd, 1908, the remedy thereunder being exclusive.

The allegations in the statement of claim are that "the defendant, The Delaware, Lackawanna & Western Railroad Company, is a common carrier corporation engaged in a business of transportation both of freight and passengers, and of interstate and foreign commerce, and is incorporated for this purpose under special Acts of the Legislature of the State of Pennsylvania." This is not an averment of an engagement in business of transportation of "freight and passengers" "in" interstate and foreign commerce; that is to say, the business of transportation only in "interstate and foreign commerce". The "business of transportation of freight and passengers" is not restricted to "interstate commerce" alone but must be taken to be an averment of the transportation of "freight and passengers" in "intrastate commerce" as well.

It was proven at the trial that at the time of Joseph D. Troxell's death he was employed as a fireman on one of the defendant's locomotives, which was actually engaged in hauling over defendant's railroad some cars containing property in interstate commerce and others engaged in intrastate commerce. The suit is instituted by Lizzie M. Troxell, the wife of the decedent, "on behalf of herself and minor children", in accordance with the provision of the Pennsylvania Act of April 15th, 1851, P. L. 674, authorizing the widow of a person whose death shall have been occasioned by an unlawful violence or negligence to "maintain an action for the recovery of damages for the death thus occasioned." The Federal Employers' Liability Act of April 22d, 1908, on this point provides: "That every common carrier &c. shall be liable in damages to any person suffering injury * * * , or in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow of decedent and children of such employee."

If the Federal Act, as urged by the defendant, be exclusive of all State legislation upon this subject, and the remedy provided thereunder also exclusive, then it would have been necessary to institute suit in the name of the "personal representative" of decedent for the benefit of the surviving widow * * * and children of "such employee", which was not done in this case.

The question is not at all free from doubt. The Act has been before the Federal and State Courts a number of times, and it has been held by the Federal Courts that the Act of April 22d, 1908, supersedes all State statutes regarding the relations of railroad employers and employees engaged in interstate commerce."

There are five cases, to which the court's attention has been called, in which the effect of the Federal Act on state and territorial legislation has been considered.

The first is the case of Fulgham vs. Midland Valley R. Co., 167 Fed. 660. In that case there was no diverse citizenship, and it could not be brought in the Federal Courts except under the Employers' Liability Act; in fact, it was admitted that the suit was brought under this Act. The defendant was engaged in interstate commerce

and the suit was instituted by the "personal representative" of the decedent. In the statement of claim the plaintiff endeavored to recover for two elements of damage based upon the State Act. In other words, the suit was instituted under the provisions of the Federal Act, and an attempt was made to recover under the State Act. Under the State Act there was an element of damage to which the plaintiff was entitled which could not be recovered under the Federal Act. They were in conflict, and it was held in that case that the recovery could not be had, and it was put upon the ground that the Federal Act superseded "all State statutes relating to the relation of railroad employers and employees engaged in interstate commerce." This case, however, is not an authority on the question as to whether or not a suit instituted under the State law, which is not in conflict with the Federal law, for a recovery under a State law for the death of an employee, against the defendant, who at the time of the employee's death was also engaged in intrastate commerce.

In the case of *Whittaker vs. Illinois Central Railroad Co.*, 192 176 Fed. 130, it was a question as to the district in which the suit could properly be instituted, the consideration of which involved the question as to whether or not the Federal Act superseded State laws on the same subject. Suit had been instituted under the Federal Act, and the statement alleged that the defendant was engaged in interstate commerce.

In *Dewberry vs. Southern Railway Company*, 175 Fed., 307, the suit was instituted under the State Act, and, on demurrer, the court held that the Federal Employers' Liability Act, making railroads engaged in interstate commerce liable for injury or killing employees while similarly engaged, is plenary, and superseded all laws of the State relating thereto. This case is almost identical on the facts with the one at bar, with the exception that it does not disclose whether or not the defendant was engaged in intrastate commerce at the time, nor whether the State Act was in any particular in conflict with the Federal Act.

The other two cases, to wit: *Conrod vs. Atchison & Co. Railway Company*, 173 Fed. 537, and *Southern Pacific Co. vs. McGinnis*, 174 Fed. 649, raise the question as to whether or not the Act of April 22nd, 1908, superseded all laws in the territory, which is entirely a different question from the one involved in the suit at bar. *El Paso & Co. Ry. vs. Gutierrez*, 215 U. S. 8.

As to the territories, "Congress may not only abrogate laws of territorial legislature, but it may also legislate directly for the local government. It may make a valid act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." *National Bank vs. County of Yankton*, 101 U. S. 133; *Mormon Church vs. U. S.*, 136 U. S. 42.

193 In neither of these cases was the question considered as to whether or not a recovery could be had under the provisions of a State law to recover damages for negligence of a common carrier

engaged in both intrastate and interstate commerce at the time the alleged damage was inflicted. There is no doubt but that if this Federal Act is to be maintained, it must be upon the ground that it relates solely to employees engaged in interstate commerce, and the States must be permitted to deal with the questions between the employer and employee in matters wholly within the State. A more complicated situation will arise, as it did in this case, where the carrier is engaged in both intrastate and interstate commerce, and that the work upon which the employee is engaged when injured is both the work of intra and interstate commerce. We are inclined to the view, that in a situation like the one at bar, where the carrier is engaged in both intra and interstate commerce, and negligently causes the death of an employee in similar employment, that the personal representative of the decedent may institute a suit under the Federal Act, or action may be brought under a State Act which is not in conflict with the Federal Act. The decision of the United States Supreme Court in the Employers' Liability Case, in declaring the Act of June 11th, 1906, unconstitutional, would indicate this view of the question. It is there said: "One engaged in interstate commerce does not thereby submit all its business to the regulating power of Congress. 207 U. S. 463.

The following decisions of State courts will be interesting in connection with this question: Frank J. Luken vs. Lake Shore & Michigan Southern Railway Company, decided March 1st, 1910, by the Appellate Court of the State of Illinois, First District, (not yet reported); Detroit, Toledo & Ironton Railway Company vs. State of Ohio, decided March 15th, 1910, by the Supreme Court of Ohio, 194 the State of Ohio (not yet reported); The State of New York, Appellant, vs. Erie Railroad Company, Respondent, decided April 26th, 1910, by The Court of Appeals of the State of New York (not yet reported); William H. Hoxie vs. The New York & c. Railroad Company, decided by the Supreme Court of Errors of Connecticut (not yet reported).

2. The approximate cause of the accident was the tampering with the brakes and blocks.

It appeared from the evidence that the decedent was a fireman employed by the defendant company, and engaged on the 21st day of July, 1909, in that capacity in handling a train on the main line towards Penn Argyl, when his engine was struck by six loaded ash cars, which, for some unexplained reason, had run away from the siding upon which they had been placed at Penn Argyl Branch, known as Albion No. 2. This siding is off the Penn Argyl Branch about 500 feet from the main line at Bangor, Portland Division of the defendant railroad. The first hundred feet of the siding is on a level and from there back for seven or eight hundred feet there is a gradual grade averaging one per cent. There is a down grade for upward of four miles from this siding to and down the main line. These cars had been placed upon this siding beyond the level portion thereof, on the grade, which, as has been said, was an average of about one per cent. There was evidence, which was uncontradicted on the part of the defendant, that these cars when placed upon the

siding were braked, and that the brake on the first car was double, that is, two men turned it as hard and as strong as possible; and further, there was evidence on the part of the defendant that blocks were placed under the wheels of the first two cars. Notwithstanding the testimony of defendant's witnesses on this point, it is a fact in the case that these cars ran away from this siding out upon the
195 main track and collided with the decedent's engine four miles below. The track was all down grade from the point from which the cars started to the point of collision. There was no derailing device used by the defendant company at the switch upon which the cars had been placed.

The defendant contended that from the evidence submitted by it of the manner of braking and blocking the cars, the inference must be drawn that it was impossible for them to run away except by the interference of outside parties, and then to further infer that outside parties actually did interfere and loose the brakes and blocks, which started the cars from the switch, that this tampering with the brakes was the approximate cause, and the defendant is not liable.

The defendant's evidence as to the braking and blocking of cars may be said to be conclusive that they could not have run away except as a result of some person loosening the brakes and removing the blocks, but there is nothing to show whether or not that was done by the railway employees, in the usual course of handling these cars, subsequent to their having been braked and blocked, or that it was outside parties, with the criminal purpose of permitting them to run out from the switch. There is no evidence on this point at all. Had the defendant been able to show that the cars started by reason of a criminal interference with the brakes and blocks by outside parties, it would have been in a more favorable position.

The contention of the plaintiff is that by establishing the fact that these cars did run away and collide with the decedent's engine four miles below the point from which they started, and the fact that the tracks of the siding, branch line, and main line were all down grade from the point where the cars started to the point where the collision occurred, together with the evidence of an experienced railroad engineer, who testified that under these circumstances there should have been a derailing device at the Albion siding,
196 she has affirmatively established the negligence of the defendant, and that the jury would be warranted in drawing such a conclusion.

The defense endeavors to avoid the charge of negligence by proving the manner of braking and blocking the cars upon the siding, and urges that a conclusion must be drawn from this evidence that the cars could not have escaped except as a result of outside interference, and insists that such a conclusion is warranted and must be drawn by the court as a matter of law. The evidence relied upon does not justify a finding that "outside parties tampered with the brakes and blocks." The evidence of the defendant on this point, however, is a matter of defense to be submitted to the jury on the question of negligence. This evidence on the one side and on the

other raise- the question of the defendant's negligence, a question of fact which was submitted to the jury under proper instructions.

3. The decedent assumed the risk of defendant's negligence.

It is contended that the decedent had placed these cars on that switch the day before, and that he knew there was no derailing device on this switch, and he, therefore, assumed all the risk of the dangerous surroundings, and assumed the risk of the defendant's negligence.

We do not think this contention can be maintained, but we think the better rule is that laid down by the Supreme Court of the United States in the case of *Texas & Pacific Railway Company vs. Swearingin*, 196 U. S. 51. In this case the court said: "Knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the North rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box * * * It was for the jury to determine from all the evidence whether he had actual knowledge of the danger."

197 There is nothing in this case to show that the decedent had actual knowledge of the danger which existed by reason of the failure of the defendant to have a derailing device at the switch. He may have known that there was no derailing device placed upon the switch, but there is nothing to show that he knew of such a combination of dangerous conditions as existed at this point.

The motion for judgment non obstante veredicto is therefore refused.

There are thirty reasons assigned for a new trial, four of which are based upon the admission of evidence on the part of the plaintiff against the objection of the defendant; fifteen allege erroneous answers to points submitted by the defendant, and six are to alleged errors in the charge of the court. The twenty-seventh reason assigned is that the verdict is excessive; the twenty-eighth the verdict was against the law; the twenty-ninth the verdict was against the evidence, and the thirtieth the verdict was against the charge of the court.

The first reason assigned for a new trial is that the court erred in permitting the plaintiff to testify to the earning capacity of her husband. She said she had seen his checks for his monthly pay, and upon that she was properly permitted to testify.

The second error is as to the plaintiff's offer to prove that blasts causing shaking and reverberations of the earth would account for the escape of the cars from the siding. The plaintiff was permitted to ask as to this condition at that point, against the objection of the defendant, but the witness knew nothing about it, so that the defendant was not injured.

In the third and fourth, the question as to whether the plaintiff's evidence of an experienced railroad engineer, to the effect that this switch was defectively equipped in not having a derailing device, was properly admissible, is raised. The witness testified that

to submit to the jury, and the witness was entirely competent to speak upon that question.

We do not think it necessary to take up seriatim the errors assigned to the answers of the court to the points submitted by the defendant, nor to those errors assigned to the charge of the court. A review of both the charge to the jury and the answers to the thirty-two different points submitted by the defendant does not, in our judgment, when read in connection with the facts in the case, show that the court committed any error.

The question of the defendant's negligence under all the circumstances was a question of fact, and it was properly submitted to the jury for their consideration, together with the question of the amount of damages which the plaintiff sustained. The jury found the defendant liable, and rendered a verdict which we think is justified by the evidence as to the earning capacity of the decedent and the amount of damages suffered by the plaintiff.

The motion for a new trial is therefore overruled.

199 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Order Granting Exception.

Filed Aug. 6, 1910.

And now, August 6, 1910, on motion of James F. Campbell, Esq., for the Deft., the Court grants an exception to the order refusing the defendant's motion for judgment non obstante veredicto.

By the Court:

JAMES B. HOLLAND, J.

200 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Præcipe for Judgment.

Filed Aug. 8, 1910.

SIR: Enter judgment on the verdict in favor of the plaintiff in the above case and against the defendant.

GEORGE DEMMING,
Att'y pro Pl'tff.

8-8-'10.

To the Clerk, U. S. Circuit Court, Eastern District of Penna.

Judgment.

HOLLAND, J.: .

And now, this 8th day of August, 1910, in accordance with præcipe filed judgment is hereby entered in favor of plaintiff and against the defendant in the above entitled case in the sum of \$7,698.00.

LEO A. LILLY,
Deputy Clerk.

201 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Assignments of Error.

Filed Aug. 16, 1910.

(1) The learned Judge erred in overruling defendant's objection to the following question-, (page 14 of testimony):

"By Mr. DEMMING:

Q: You say you know what your husband earned?

A. Yes, sir.

Q. How much did he earn?

Mr. CAMPBELL: I object to that.

(Objection sustained.)

(Exception noted for plaintiff by direction of the court.)

By the COURT:

Q. How do you know what he earned?

A. Because I used to see his checks.

Q. What checks? Of the railroad company?

A. Yes, sir.

The COURT: She may answer the question.

202 Mr. CAMPBELL: I still object, for the reason that the proper way to prove that is to call for the checks.

(Objection over-ruled.)

(Page 15 of testimony:)

(Exception noted for defendant by direction of the Court.)

By Mr. DEMMING:

Q. Tell us how much those checks were a month. Was he paid by the month or by the week, or what?

A. By the month. He used to draw pay every month.

Q. How much would those checks be a month?

A. From seventy to a hundred dollars a month.

Q. How much did it average a month?

A. About eighty-five dollars."

(2) The learned Judge erred in his remarks to the jury in qualifying defendant's Sixth point for charge, which was as follows:

"Mere absence of a derailing device at the Albion Switch, is not negligence or a fact from which negligence can be inferred."

The learned Judge saying:

"The mere absence of a derailing device at the Albion Switch is not negligence. That is true. That is, the fact of its absence alone does not establish negligence. The next proposition, 'or a fact from which negligence can be inferred,' is true. It cannot be inferred, from that fact alone, but you may take that fact into consideration, together with the surrounding circumstances, in arriving at the question as to whether it was negligence."

203 (3) The learned Judge erred in refusing to charge the jury upon defendant's Eighth point, which was as follows:

"You are instructed that while the defendant was bound to use reasonable care in providing a safe place to work, he need not guarantee that it is absolutely safe."

(4) The learned Judge erred in refusing to charge the jury upon defendant's Eleventh point, which was as follows:

"If you find from the evidence that decedent Troxell knew that there was no derailing device on the Albion Switch, then you are instructed that he assumed all risk of anything that might happen to him by reason of its absence."

(5) The learned Judge erred in his remarks to the jury in qualifying defendant's Thirteenth point, which was as follows:

"If you find from the evidence that the decedent Troxell knew of the absence of this derailing device and the danger from it was obvious to him, then he assumed whatever risk that there might be from its absence and your verdict should be for the defendant."

The learned Judge saying:

"This, gentlemen of the jury, would be true, if Troxell knew that there was no derailing switch there, and also that the danger which befell him was obvious to him—that is, so plain that he could know that at almost any time loaded cars might run out of there on to the main track and kill him. If he knew that, and it was obvious to him, he could not recover if he took the chances and continued. But, did he know it? Could he know it? Was 204 he an expert in the constructing and building of a railroad?"

Did he know what might occur from that situation? As I say, he had a right to assume it was properly done, and if he knew that it was not properly done, and that it might result in damage, then of course he took the chances and he could not recover."

(6) The learned Judge erred in refusing to charge the jury upon defendant's Fourteenth point, which was as follows:

"You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not the servant was guilty of contributory negligence in assuming the risk or in exposing himself to the danger."

(7) The learned Judge erred in refusing to charge the jury upon defendant's Seventeenth point, which was as follows:

"You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work."

(8) The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-first point for charge, which was as follows:

"You are instructed that although the defendant is guilty of negligence, or you find it so, in not providing proper appliances, the plaintiff cannot recover if the decedent Troxell knew of 205 the defective condition and continued to expose himself to it."

The learned Judge saying:

"That is another proposition that is rather indefinite. If Troxell knew the whole situation, knew of the danger that was lurking there, and kept on, he could not recover. But if he knew there was a derailing switch lacking, and, in a general way, he knew that that was an improper construction, it was not his right to require a different construction. Nor was he required first to notify the Company that there was no derailing switch there, to enable him

or his representatives to recover for an injury resulting by reason of this defective construction, if it was such a defective construction, or such a construction as was unusual and improper under the circumstances."

(9) The learned Judge erred in his remarks to the jury in the qualification of defendant's Twenty-third point for charge, which was as follows:

"You are instructed that the risks which an employee assumes from his knowledge thereof are not affected by the rapidity or promptness with which he may be required to act at the time of the accident."

The learned Judge saying:

"That is sort of an academic proposition. It is true, but it has not much to do with this case."

(10) The learned Judge in his remarks to the jury in the qualification of defendant's Twenty-seventh point for charge, which was as follows:

"You are instructed that a railroad company is not liable for injuries due to collisions or accidents to its trains, caused by the negligent or wrongful acts of third persons not in the employ of the company and done without its knowledge or consent."

The learned Judge saying:

"There is no evidence that the negligent act of some outsider did contribute towards this injury."

(11) The learned Judge erred in refusing defendant's Twenty-eighth point, which was as follows:

"You are instructed that there is no evidence of negligence upon the part of the defendant, and your verdict should be for the defendant."

(12) The learned Judge erred in refusing defendant's Thirtieth point for charge, which was as follows:

"The decedent Troxell assumed the risk of defendant's negligence and your verdict should be for the defendant."

(13) The learned Judge erred in refusing defendant's Thirty-first point for charge, which was as follows:

"If you find from the evidence that the train which the decedent Troxell's locomotive was hauling at the time of the accident, contained freight destined from or to any other State, Territory, or Foreign Country, then you are instructed that plaintiff has no right of action against the defendant, and your verdict must be for the defendant."

(14) The learned Judge erred in refusing defendant's Thirty-second point for charge, which was as follows:

"Under all the evidence your verdict should be for the defendant."

(15) The learned Judge erred in his charge to the jury in saying (pages 159-160):

"If it be true that the national Act excludes all other acts, and that Lizzie M. Troxell has brought suit in her own name instead of in the name of an administrator of her deceased husband, this suit could not be maintained; but, for the purposes of this case, gentle-

men of the jury, I instruct you that that is not the law, but that there is concurrent jurisdiction, or, at any rate, there is a liability under the Pennsylvania Act, and if the plaintiff sees fit to bring her suit under the Pennsylvania Act, and institutes that suit in accordance with the requirements of the Pennsylvania Act, she is properly in Court, and you will consider her case without any regard to the requirements of the national Act, which deals with railroads and employees engaged in interstate commerce."

(16) The learned Judge erred in his charge to the jury in saying (pages 163-164):

"If it was an improper construction, if they should have had, as testified to by some of the witnesses, a derail switch there, or any other device under the circumstances, and it was not the proper kind of a connection, and was dangerous to the employees that were engaged in their ordinary work on the main line, then the defendant would be responsible."

(17) The learned Judge erred in his charge to the jury in saying (pages 164-165):

"An employee on a train who sees a bridge which he thinks might possibly be too low, cannot require the company to alter it; or, if he goes along and sees an embankment a little too steep, he cannot require the company to grade it differently; or, if he sees an overhanging rock that he thinks might fall down, he cannot order the company to take it away; and, in case it fails to do all those things, or any of them, make it answerable in damages for any accident which may happen. The employee has a right, so far as the general safety of the railroad and the general safety of the appliances are concerned, to assume that the employer has performed its duty. If there is some specific thing, about which the employee knows as much as the employer, it is his duty to call the employer's attention to it if there is a defect. But, to insist that the employee shall tell the company how to construct the road, and where to construct it, and what grades to make, and how to operate it, is not the law. The employees have a right to presume that the company knows its business in that regard and will perform its duty as required by law and furnish a safe trackage, a safe situation, safe appliances, and so on."

(18) The learned Court below erred in refusing to grant defendant's motion for judgment non obstante veredicto:

"And now, April 9th, 1910, the defendant by its Attorney, James F. Campbell, moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto, upon the whole record.

At the trial the following point for binding instructions was refused: 'Under all the evidence, your verdict should be for the defendant.'"

JAMES F. CAMPBELL,
Attorney for Defendant.

209 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Of April Term, 1909. No. 694.

LIZZIE M. TROXELL

VS.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,
a Corporation.

Petition for Writ of Error.

Filed Aug. 16, 1910.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of The Delaware, Lackawanna & Western Railroad Company, respectfully represents:

That an action was brought against it in the Circuit Court of the United States for the Eastern District of Pennsylvania by Lizzie M. Troxell, a citizen and resident of the State of New Jersey, at the April Term of said Court, 1909, No. 694, to recover certain damages received by said plaintiff on account of the alleged wrongful death of her husband, Joseph Daniel Troxell, an employee of the said defendant company.

That at the April Sessions, 1910, a verdict was rendered against your petitioner in the sum of Seven thousand six hundred and ninety-eight dollars and twenty-eight cents (\$7,698.28).

210 That exceptions were taken to the rulings of the Court and to the charge and decision of the learned Judge upon the law and a refusal of the learned Judge to approve certain points presented by your petitioner and a Bill of Exceptions has been presented, signed and sealed by the learned Judge and filed of record in the said court.

That a motion for a new trial and a motion for judgment non obstante veredicto on behalf of your petitioner were made, assigning as reasons the error on the part of the Court in declining the instructions prayed for on behalf of the defendant and in the charge of the Court to the jury, which motion for a new trial, and for judgment non obstante veredicto, as aforesaid, after argument has been refused, with an exception to the refusal of defendant's motion for judgment non obstante veredicto. That on the eighth day of August, A. D. 1910, judgment was entered against your petitioner in the amount of Seven thousand six hundred and ninety-eight dollars and twenty-eight cents (\$7,698.28).

That assignments of error have been filed with the clerk of the said Circuit Court of the United States in accordance with the rules of this court.

Therefore, your petitioner prays that a writ of error be allowed in

the premises directed to the Circuit Court of United States for the Eastern District of Pennsylvania, that a citation be issued returnable in thirty days upon the entry of security in the sum of Fifteen thousand three hundred and ninety-six dollars and fifty-six cents (\$15,396.56); and that a supersedeas may be granted and a stay of execution and proceedings in the court below upon such writ of error and appeal.

And your petitioner will ever pray, etc.

THE DELAWARE, LACKAWANNA &
WESTERN RAILROAD CO.,

By T. E. CLARKE,
General Superintendent.

211 CITY OF SCRANTON,
Middle District of Pennsylvania, ss:

T. E. Clarke, General Superintendent of The Delaware, Lackawanna & Western Railroad Company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition by him subscribed are true as therein stated.

T. E. CLARKE.

Sworn to and subscribed before me this 13th day of August, A. D. 1910.

[SEAL.]

DANIEL R. REESE,
Notary Public.

My commission expires Jan. 21, 1911.

Order Allowing Writ of Error.

Filed Aug. 16, 1910.

Before Holland, J.:

And now, to wit, the 16th day of August, 1910, the petition of The Delaware, Lackawanna & Western Railroad Company praying for a Writ of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania, having been read and considered, and the rulings of the Circuit Court of Appeals of the United States for the Third Circuit having been complied with as to the filing in the Court below of Assignments of Error, it is ordered that a Writ of Error be allowed and that a citation be issued addressed as prayed for, returnable within thirty days hereafter upon the entry of security in the sum of Fifteen thousand three hundred and ninety-six dollars and fifty-six cents, that a supersedeas be granted and proceedings stayed upon this Writ of Error.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

212 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1909. No. 694.

No. 694.

LIZZIE M. TROXELL

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY.

Præcipe Sur Transcript of Record.

Filed Aug. 16, 1910.

To the Clerk of the United States Circuit Court, Eastern District of Pennsylvania.

SIR: In making up the transcript of record sur writ of error in the above entitled cause, you are to include the following papers:

Docket Entries.

Statement of Claim.

Plea.

Bill of Exceptions.

Motion and Reasons for New Trial.

Motion for judgment non obstante veredicto.

Additional motion and reasons for new trial.

Opinion.

Order granting an exception.

Præcipe for Judgment.

Judgment.

Assignments of Error.

213 Petition and Order allowing Writ of Error.

Writ of Error.

Citation

Clerk's Certificate, and no others.

JAMES F. CAMPBELL,
Attorney for Plaintiff-in-Error.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, act:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Pleas and Proceedings in the case of Lizzie M. Troxell v. The Delaware, Lackawanna & Western Railroad Company, No. 694, April Session, 1909, as per præcipe filed, a copy of which is hereto annexed on file and now remaining among the records of the said Court in my office.

18-354

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 25th day of August, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

214 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD Co., Plaintiff
in Error,

vs.

LIZZIE M. TROXELL, Defendant in Error.

And afterwards, to wit, on the twentieth and twenty-fourth days of October, 1910, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, and Hon. W. M. Lanning, Circuit Judges, and Hon. Joseph Cross, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-ninth day of November, 1910, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

215 *Opinion of Circuit Court of Appeals.*

Before Buffington and Lanning, Circuit Judges, and Cross, District Judge.

Cross, *District Judge*:

This action was instituted by Lizzie M. Troxell, as the widow of Joseph D. Troxell, on behalf of herself and two minor children, under the Pennsylvania statute, to recover damages for the death of her husband, on July 21st, 1909, caused as alleged by the negligence of the defendant. The deceased at that time was employed by the defendant company, in the capacity of a fireman on a locomotive engaged in hauling cars in interstate commerce. The declaration alleges in substance, that the deceased, while in the performance of his duties, and without any negligence on his part, was killed through the negligence and carelessness of the defendant, in failing to supply and keep in repair, proper, necessary and safe devices, whereby the locomotive on which he was performing his duties, came into violent collision with several runaway cars, causing his death.

It appears that the defendant, in the course of its business, had, for about eight years, maintained a siding known as Albion Siding No. 2, which extended out from its Pen Argyl branch. The siding was but a few hundred feet long and connected with the Pen Argyl branch at a distance of from three to four hundred feet from Pen Argyl Junction, which is the point at which the branch joined the main line of the defendant company. The Pen Argyl branch is itself a blind spur and extends only from its junction with the main line to Pen Argyl station. The deceased, previous to the accident, had been in the employ of the defendant for about three years, for a considerable part of that time as a brakeman, and later as a fireman. The division upon which he worked was known as the Bangor and Portland division, and ran from Nazareth to Portland in Northeastern Pennsylvania. On July 19th, 1909, Troxell, the deceased, at the request of his engineer, took charge of a locomotive and

216 placed six gondola cars loaded with ashes upon Albion Siding No. 2. On the following day it was found necessary to place some cars on the siding at the rear of those, and in order to do so, it was first necessary to take them out, which was done, and they were afterwards replaced on the siding. The cars, after having been thus taken out and replaced, were according to the testimony, securely blocked and braked, and remained in that condition on the siding in question, for about twenty-four hours, when from some unexplained cause, they got away, ran from the siding on to and over the Pen Argyl branch and from it, to the main track and thereon for a distance of nearly six miles, when they came into collision with a locomotive drawing a train of loaded freight cars, on which locomotive the deceased was then acting as fireman. As a result of the collision Troxell was killed. At the point on the siding where the cars were when they were freed, the grade was descending, as was also that of the Pen Argyl branch, and of the main track over which the runaway cars passed until within about half a mile of the point of collision, when there is evidence that the grade slightly ascended, which somewhat modified the speed of forty-five or fifty miles an hour at which the runaway cars were going, according to the evidence, just prior to the collision. The grade at Albion Siding No. 2, was for a short distance from the point of its junction with the Pen Argyl branch, nearly level, after that there was an up grade of about one per cent., and the cars which ran away, were, when they were braked and blocked as above stated, standing on that part of the siding having the ascending grade.

The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding

217 braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged

with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was "doubled," that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might "be said to be conclusive that they (the cars) could not have run away except as the result of some person loosening the brakes and removing the blocks," and as to how or by whom the brakes were loosened and the blocks removed, he admitted that there was no evidence. It appears that the case was allowed to go to the jury principally upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. Any theory, however, might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. In *Patton vs. Texas and Pacific Railway Co.*, 179 U. S., 658, 663, Mr. Justice Brewer said:

218 "It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, under the circumstances, the mere absence of a derailing switch furnished no evidence of negligence. It is doubtless a valuable device, but there is no statute that requires its introduction, nor does the law impose upon a railroad company the duty of adopting and using the very latest and best means of avoiding accidents. It is only obliged to exercise all reasonable care to furnish reasonably suitable and safe appliances. The rule is carefully stated by Mr. Jus-

ties Lamar, in Washington, &c., R. R. Co. vs. McDade, 135 U. S., 554, 570, in the following language:—

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

219 The rule in respect to machinery is the same as that in respect to place. Patton vs. Texas & Pacific Railway Co., supra.

The defendant in this case, according to the uncontradicted testimony, secured the cars on the siding in question with, to say the least, reasonable care and safety, and in so doing, did all that under the law it was required to do. It was under no obligation to provide additional or cumulative devices. It was not required to insure against accident. Some stress, however, was laid upon the fact that the siding in question had a grade which descended towards the Pen Argyl Branch; that circumstance, however, has no controlling weight, since, according to the testimony, the cars were securely and safely blocked at the place on the siding where they were left; the testimony therefore necessarily took into account the uneven grade of the siding at that place.

In Norfolk & Western R. R. Co. vs. Cromer's administratrix, 101 Va., 667, the court dealt with a situation very like that here presented. It appeared in that case that the deceased, a fireman on an engine drawing a passenger train which was behind time, and running at a high rate of speed, was killed by a collision between his train and some freight cars which had escaped to the main track from a siding upon which they were stored. But it did not appear how the freight cars, which had their brakes fastened and in a safe condition, escaped. Speaking on that point, the court said that it was a matter wholly of conjecture. After suggesting and commenting upon two possible theories, the court said, "it is immaterial which theory is adopted. If the brakes which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position were tampered with, the company would, of course, not be responsible." It also appeared in the case that some months prior to the accident, a derailing switch had been installed on the siding, which, however, had been removed before the accident, and it was insisted that its presence would have prevented the accident, and that its removal constituted negligence on the part of the defendant. In

dealing with this point the court said:—

220 "In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailing switch to prevent the moving of cars from the siding to the main track.

"It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly-discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

Other cases touching the point in question are *Grand Trunk, &c., R. Co. vs. Melrose*, 166 Ind., 658; *Edgar vs. Rio Grande & Western Ry. Co.*, 90 Pac. Rep., 745; *Fredericks vs. Northern Central R. Co.*, 157 Pa., 103.

After a careful consideration of the evidence in the case, we are unable to find anything which reasonably establishes any negligence upon the part of the defendant. Under these circumstances therefore, the judge erred in refusing — charge the defendant's twenty-eighth request as follows, "You are instructed that there is no evidence of negligence on the part of the defendant, and your verdict should be for the defendant," the denial of which request was covered by the eleventh assignment of error. In the view that we have taken of the case, it is unnecessary to consider the other points raised.

The judgment below is therefore reversed with costs, and judgment directed to be entered for the defendant non obstante veredicto, pursuant to a motion of that character made and denied by the trial judge, and its refusal assigned for error herein.

221 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD Co., Plaintiff
in Error,

VS.

LIZZIE M. TROXELL, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed with costs, and that judgment be entered for the defendant non obstante veredicto, pursuant to a motion of that character made and denied by the trial judge.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1432. Order Reversing Judgment. Received and
Filed December 5, 1910. Saunders Lewis, Jr., Clerk.

222 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1910.

No. 1432 (List No. 45).

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO., Plaintiff
in Error,

vs.

LIZZIE M. TROXELL, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

And now, to wit, this thirtieth day of January, 1911, it is ordered that Mandate issue to the said Circuit Court of the United States, for the Eastern District of Pennsylvania, in accordance with the Opinion and judgment of this Court in said cause.

W. M. LANNING,
Circuit Judge.

Endorsed: No. 1432. Order for Mandate. Received and Filed January 30, 1911. Saunders Lewis, Jr., Clerk.

223 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial Circuit, et:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Delaware, Lackawanna & Western Railroad Company, Plaintiff in Error, vs. Lizzie M. Troxell, Defendant in Error, No. 1432, October Term, 1910, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Ninth day of January in the year of our Lord one thousand nine hundred and Thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
*Clerk of the U. S. Circuit Court of
Appeals, Third Circuit.*

224 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States to the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Whereas, in a certain suit in said Circuit Court of Appeals between The Delaware, Lackawanna & Western Railroad Company, plaintiff in error, and Lizzie M. Troxell, Administratrix of the estate of Joseph Daniel Troxell, deceased, defendant in error, which suit was removed into the Supreme Court of the United States by virtue of a writ of error agreeably to the Act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to-wit:

"A copy of the record of the case entitled Lizzie M. Troxell vs. The Delaware, Lackawanna & Western Railroad Company, October Term, 1910, file No. 1432,"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ before the said Supreme Court forthwith.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of January, A. D. 1913.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

225 [Endorsed:] File No. 23,429. Supreme Court U. S., October Term, 1912. Term No. 854. Lizzie M. Troxell, Administratrix, etc., Pl'ff in Error, vs. The Delaware, Lackawanna & Western Railroad Company. Writ of Certiorari. Received & Filed Jan. 9, 1913. Saunders Lewis, Jr., Clerk. Filed — —, 191—.

226 In the United States Circuit Court of Appeals for the Third Circuit.

In obedience to the foregoing writ of certiorari, and in return thereto, I transmit herewith a duly certified copy of the record in the case entitled Lizzie M. Troxell vs. Delaware, Lackawanna & Western Railroad Co. October Term, 1910, file No. 1432.

In witness whereof, I hereunto subscribe my name and affix the Seal of the said United States Circuit Court of Appeals this 9th day of January, A. D. 1913.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

Clerk United States Circuit Court of Appeals, Third Circuit.

227 [Endorsed:] File No. 23,429. Supreme Court U. S., October Term, 1912. Term No. 854. Lizzie M. Troxell, adm'x &c., Pl'ff in Error, vs. The Delaware, Lackawanna & Western Railroad Company. Writ of Certiorari & Return thereto. Filed January 10, 1913.

IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE.

*To the Honorable, the Justices of the Supreme Court
of the United States:*

And now comes Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, the plaintiff in error, and moves and petitions this Honorable Court to advance her above-entitled cause for hearing and argument.

The appeal of the plaintiff in error is from a final judgment of the United States Circuit Court of Appeals for the Third Circuit, entered against her on the sixth day of November, 1912, and which judgment reversed a verdict in her favor of the United States Cir-

cuit Court for the Eastern District, entered on the first day of April, 1912:

From said judgment of the Circuit Court of Appeals of the Third Circuit, an appeal to this court has been taken, and a writ of error sued out by the plaintiff in error, and the same is now pending and undetermined, being Case No. 854 upon the calendar or docket of causes in this court. This motion and petition for an order to advance this cause for argument out of its regular order is made in accordance with sections 6 and 7 of rule 26 of this court, permitting such advancement under special and peculiar circumstances to be shown to this court.

The special and peculiar circumstances in the present case, justifying such an order for advancement in the view of plaintiff in error, are:

This action was brought by the plaintiff in error on behalf of herself as widow, and her two infant children, orphans, to recover from the defendant in error railroad company, damages for the negligent killing of her husband while in the employ of the defendant in error in the capacity of a locomotive fireman, and while the defendant in error was engaged in interstate commerce. The liability of the defendant in error is based upon the act of Congress, approved April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," and which act was amended by an act of Congress, approved April 5, 1910.

Upon the trial of this action in the circuit court below, a jury rendered a verdict in favor of the plaintiff as administratrix of the estate of the dead fireman, and assessed the damages at the amount of ten thousand one hundred and ninety-six dollars and fifty cents (\$10,196.50).

Previous to this action based upon the acts of Congress aforesaid, plaintiff in error, acting individu-

ally, as the widow and as allowed under the laws of the state of Pennsylvania where said accident occurred, and which laws the circuit and district courts sitting in said state were bound to observe and follow, so far as procedure is concerned, brought an action for damages against the defendant in error, and obtained a verdict under the common law principles of negligence. Plaintiff in error did this because of the great confusion and uncertainty existing at that time as to whether or not this act of Congress of April 22, 1908, was constitutional, and would be so held by this court, and because of the long delay which would necessarily ensue before this court could finally pass upon the constitutionality of this act.

Upon an appeal by the defendant in error to the Circuit Court of Appeals of the Third Circuit from the judgment of the Circuit Court affirming the verdict in the first action brought by plaintiff in error, the Circuit Court of Appeals reversed this verdict rendered in her favor under the common law principles and ordered judgment to be entered in favor of the defendant in error railroad company.

Plaintiff in error then filed a petition in this court for a writ of certiorari reviewing said action of the Circuit Court of Appeals for the Third Circuit, which petition for certiorari was refused by this court.

Thereupon plaintiff in error took out letters of administration and went back to the Circuit Court for the Eastern District of Pennsylvania, and brought an action based absolutely and entirely upon said acts of Congress aforesaid. Upon the trial of this second action, a jury again rendered a verdict in favor of the plaintiff in error, and assessed the damages at the sum as above set forth. Whereupon, defendant in error again appealed to the Circuit Court of Appeals for the Third Circuit, and said Circuit Court of Ap-

peals reversed said verdict in favor of plaintiff in error as administratrix, and ordered judgment to be entered in favor of defendant in error. In doing this, the said Circuit Court of Appeals gave as its reason that the first action brought individually by the plaintiff in error under the common law, was *res judicata* of this second action brought by the plaintiff in error as administratrix under said acts of Congress.

From this judgment of said Circuit Court of Appeals for the Third Circuit, plaintiff in error has taken her appeal to this court.

Plaintiff in error is a widow, has been left destitute and is absolutely dependent upon her own struggling efforts for her support and the support of her two small children left fatherless by this accident. She has been endeavoring now for nearly three and one-half years to obtain redress for the alleged negligence of defendant in error in causing the death of her husband and the father of her children.

Two verdicts in her favor, one for her as an individual, and the second for her as administratrix, have been taken away from her. She feels that she is entitled to a speedy determination as to whether or not she is entitled to recover anything as damages for the relief of herself and her children. These circumstances, she respectfully submits, should appeal to the conscience of this court.

Plaintiff in error also believes that the question of law arising in this case, and decided adversely to her contention, is of public interest as well as to the interest of other litigants which would be greatly subserved by an early and final decision by this court. Plaintiff in error is informed that this same question has arisen in other cases and in other parts of the United States, and that it is of great public interest to know definitely and conclusively whether or not an

action brought as administratrix (or administrator), under these acts of Congress above mentioned, is to be held *res judicata* by the judgment rendered in another and common law action brought by an individual.

Plaintiff in error is also informed and understands that this court has granted an order to advance with regard to three other certain suits and actions begun under the same above mentioned acts of Congress and appealed for final decision to this court, and that these other three suits have been placed for hearing on Monday, January 6, 1913. She, therefore, respectfully submits that, while the mind of the court is upon this particular subject, her own appeal could probably be heard and determined at the same time without taking up too much of the valuable time of this court, and that the interest of all parties concerned might thereby be conserved and the ends of justice attained. She, therefore, asks that this present cause be fixed for argument before this court on the said sixth day of January, 1913.

For all of which relief, the plaintiff in error respectfully prays.

GEORGE DEMMING,
Attorney for Plaintiff in Error.
1112 Land Title Building,
Philadelphia, Pennsylvania.

Dated November 23, 1912.

Dear Sir:

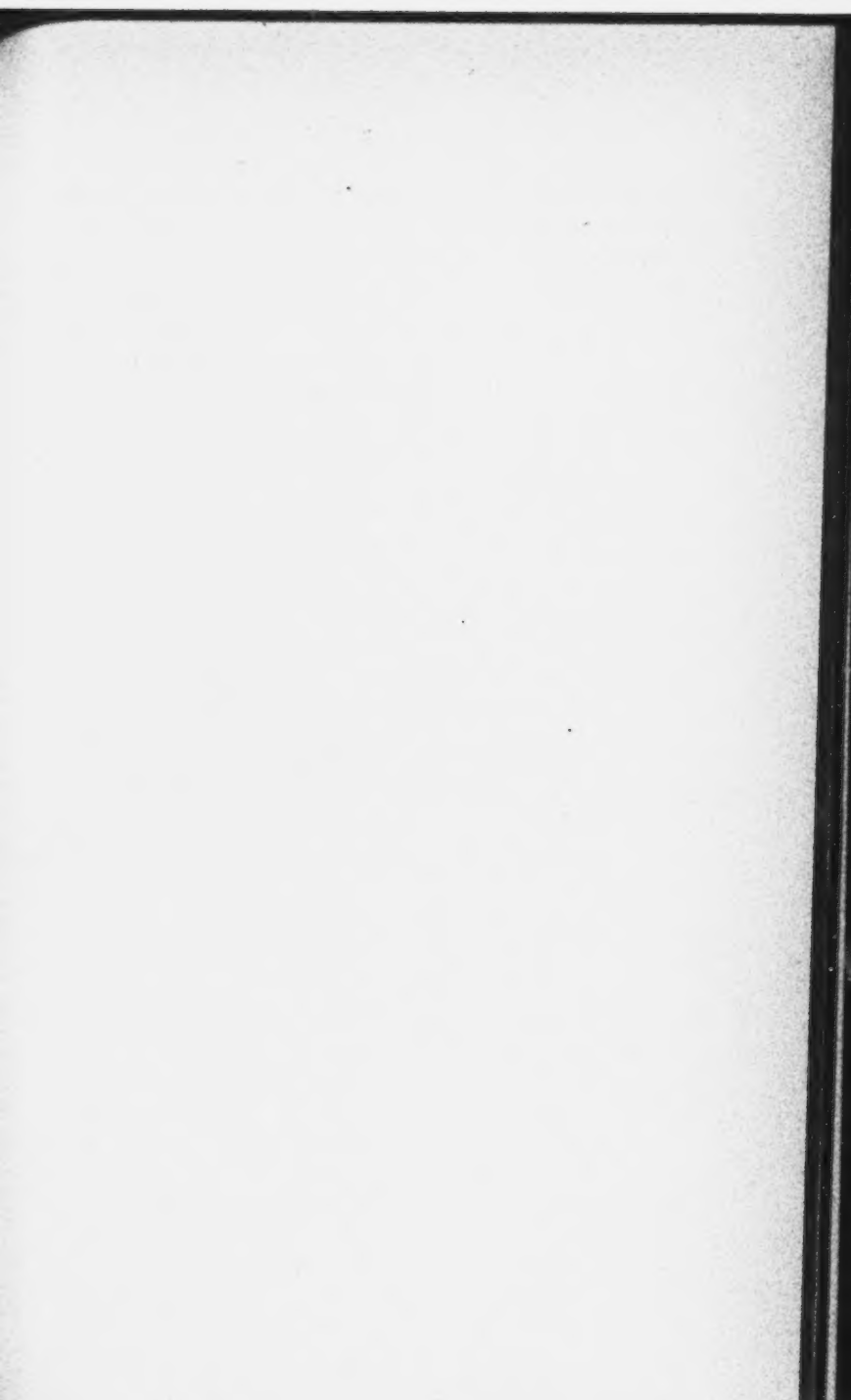
Please take notice, that the foregoing motion to advance the above-entitled cause and to set the same down for argument upon the day fixed for the argument of other causes arising from and based upon the selfsame acts of Congress, will be presented at the opening of the court, at the Capitol Building, in the

city of Washington, District of Columbia, on Monday, the second day of December, 1912, or as soon thereafter as counsel can be heard.

GEORGE DEMMING,
Attorney for Plaintiff in Error,
1112 Land Title Building,
Philadelphia, Pennsylvania.

Dated November 23, 1912.

To James F. Compbell, Esq.,
Attorney for Defendant in Error.



IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

The petition of The Delaware, Lackawanna and Western Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Pennsylvania, defendant in error herein,

RESPECTFULLY REPRESENTS:

1. That your petitioner was the defendant in a certain action in trespass brought by Lizzie M. Troxell, administratrix of the estate of Joseph Daniel Troxell, deceased, plaintiff in error herein, in the Circuit Court of the United States for the Eastern District of Pennsylvania, as of October Term, 1910, No. 1220, wherein a verdict and judgment for plaintiff, said Lizzie M. Troxell, administratrix, etc., was had.

2. That your petitioner in said action in said Circuit Court, filed its pleas of "Not guilty" and "*Res judicata*"

"in that an action brought by Lizzie M. Troxell, for the benefit of herself and children vs. The Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in this court, as of April Sessions, 1909, No. 694, was upon the same cause of action, wrong and injury as is alleged in the statement of action in this present suit, and that upon the trial thereof in this court, there was a verdict rendered for the plaintiff, upon which judgment was entered, which was in due time appealed to the Circuit Court of Appeals, for the Third Circuit, and by that court reversed, with an order that judgment non obstante veredicto be entered therein for the defendant, and that this reversal was upon the merits of the said cause."

3. That your petitioner at the trial of this action in said Circuit Court, to substantiate its plea of "*Res judicata*," offered in evidence the record of the former suit. (See transcript of record herein, pages 13 and 209.)

4. That your petitioner sued out a writ of error from the Circuit Court of Appeals for the Third Circuit, and advanced, *inter alia*, as a ground for reversing said judgment of said Circuit Court, that the entire matter was *res judicata* by the former action.

5. That in order to save encumbering the record upon the writ of error in the present action from the Circuit Court of Appeals, by and with the suggestion, advice and consent of the clerk of said court, in view of the fact that the record of the former action was a part of the records of said court and within the judicial cognizance of said court, your petitioner did not print

anew the record of the previous action offered in evidence as aforesaid, but filed a copy thereof with said clerk, and at the oral argument handed up to the judges of said court the record of said former action as a part of the record in the present action, at which time full argument on the question of *res judicata* was had, no objection thereunto having been made at any time by counsel for the present plaintiff in error.

6. That said Circuit Court of Appeals considered said record of said former action, and it will appear from the opinion of said Circuit Court of Appeals that said record of said former action was duly before them. (See transcript of record herein, pages 333, et seq.)

7. That neither your-petitioner nor its counsel was ever served by plaintiff in error or her counsel, with a copy of the *praecipe*, indicating the portions of the record to be incorporated into the transcript of record, on this writ of error, as is provided for by rule 8, of the rules of the United States Supreme Court.

8. That your petitioner received on December 17, 1912, a copy of the transcript of record on this writ of error, at which time your petitioner first became aware of the neglect or oversight, which resulted in the omission from the transcript of record on this writ of error of the record of the former action which had been duly received in evidence and made a part of the record upon the appeal to said Circuit Court of Appeals, as hereinbefore set forth.

9. That your petitioner, therefore, suggests that there is a diminution of the record on this writ of error, because the transcript of record in this court does not contain the record of the action brought by Lizzie M. Troxell for the benefit of herself and children

vs. The Delaware, Lackawanna and Western Railroad Company, to recover damages for the alleged wrongful death of her husband, Joseph Daniel Troxell, in the United States Circuit Court for the Eastern District of Pennsylvania, as of April Sessions, 1909, no. 694 (Circuit Court of Appeals, Third Circuit, October Term, 1910. File No. 1432).

Wherefore your petitioner prays that a *Writ of Certiorari for Diminution of Record* may be issued in this matter out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this court a copy of the record of the case entitled Lizzie M. Troxell vs. The Delaware, Lackawanna and Western Railroad Company, October Term, 1910, File No. 1432, to the end that said record in said action may be made a part of the transcript of record on this writ of error, as hereinbefore set forth.

And your petitioner will ever pray.

JAMES F. CAMPBELL,
DANIEL R. REESE,
J. HAYDEN OLIVER,
Pro Petitioner.

EASTERN DISTRICT OF PENNSYLVANIA, ss.:

James F. Campbell, being duly sworn according to law, deposes and says that he is counsel of record for defendant in error in the above cause, and that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this 21st day of December, A. D. 1912.

JAMES F. CAMPBELL

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IN THE
Supreme Court of the United States,

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United
States:*

The answer of Lizzie M. Troxell, as administra-
trix, plaintiff in error herein to the petition of The
Delaware, Lackawanna and Western Railroad Com-
pany, a corporation organized and existing under and
by virtue of the laws of the state of Pennsylvania,
defendant in error, respectfully shows:

First.—Plaintiff in error admits the facts set
forth in paragraph one of the said petition.

Second.—Plaintiff in error admits that the pleas
stated in the second paragraph of the said petition to
have been filed, were filed, but denies the conclusions
of law set forth in the second plea.

Third.—Plaintiff in error admits the facts set forth
in paragraph three of the said petition.

Fourth.—Plaintiff in error admits the facts set
forth in paragraph four of the said petition.

Fifth.—Plaintiff in error does not know why counsel for defendant in error omitted from the record, by his express direction, the record of the action named in his plea of *res judicata*. Neither does plaintiff in error know what the clerk of the Circuit Court of Appeals, for the Third Circuit, said or did not say, but plaintiff in error is advised by said clerk that he did not suggest, or advise, or consent to the omission of the record in the former action. Plaintiff in error is advised by her counsel that on the trial in the District Court he objected and excepted to the offering in evidence of said record, and continued his objections and exceptions to the admission of the said record at all times. (Record, pp. 13, 209.) Plaintiff in error, moreover, shows to your Honorable Court that these alleged facts are irrelevant and immaterial. That the record in this cause shows that the entire record on file in the Circuit Court of Appeals for the Third Circuit has been brought to this court (Record, p. 341) and said record in said Circuit Court of Appeals for the Third Circuit shows that there was brought to that court from the United States District Court [now] for the Eastern District of Pennsylvania, just that portion of the record which defendant in error here [then plaintiff in error] requested and directed in writing as follows, to wit:

“To the Clerk of the U. S. District Court E.
“D. of Pa.

“In making up the record in the above case
“sur writ of error you are to include the following
“papers:

“Docket entries.

“Statement of claim.

“Plea.

“Petition for an order to show cause why case
“should not be stricken from trial list.

“Order of court granting rule to show cause,
“etc.

“Answer to petition.

- "Order refusing to strike case from trial list.
- "Jury—Verdict.
- "Bill of exceptions.
- "Motion for judgment n. o. v.
- "Opinion.
- "Praeceptum for judgment—Judgment.
- "Exception.
- "Assignments of error.
- "Writ of error.
- "Clerk's certificate.
- "And no others.

"JAMES F. CAMPBELL,
"Attorney for Plaintiff in Error."

(at Record, p. 331.)

Sixth.—Plaintiff in error admits the facts stated in the sixth paragraph of the said petition; but plaintiff in error represents that the action of the Circuit Court of Appeals therein set forth forms the fourth and fifth assignments of error in this court. (Record, p. 337.)

Seventh.—Plaintiff in error admits that her counsel did not serve defendant in error, or its attorney, with any praecipe indicating portions of the record in the Circuit Court of Appeals to be brought to this court for the simple reason that the *entire* record from the said Circuit Court of Appeals was brought to this court.

Eighth.—Plaintiff in error does not know when the attorney for the defendant in error first became aware that the record which he had himself directed to be omitted from the record in the said Circuit Court of Appeals was not brought to this court, but submits that this is immaterial because said record in this court could only consist (as it actually does consist) of the record as it exists in the Court of Appeals.

Ninth.—In answer to the ninth paragraph of the said petition, and to the prayer with which said petition concludes, plaintiff in error calls to the attention

of this Honorable Court that the prayer is not a certiorari for diminution of the record in this cause, but is a prayer that the record in another cause between Lizzie M. Troxell as an individual against the defendant in error, which is an absolutely separate action, distinct from the present, under a different term and number in the court below, shall be certified to this court.

As a general answer to the said petition, plaintiff in error shows that the said petition is not in anywise a motion for a certiorari for diminution of the record. It is on its face a motion called a motion for a certiorari for diminution of the record, but in reality asks that a wholly different record of another case be certified to this court. In that other case plaintiff in error sued individually. In this case she is suing as administratrix. It is not alleged, and it could not be alleged, that the record in the former suit was part of the record of this case in the Circuit Court of Appeals, and plaintiff in error avers that it has never been, and is not now on file even in the District Court where this case was tried. The record now before this court is the record of the suit of Lizzie M. Troxell, administratrix, vs. the defendant in error—and is the whole and complete record of that cause in every particular whatsoever as it was and is on file in the Circuit Court of Appeals. More than this, it is exactly and identically the whole record as defendant in error brought the same from the District Court to said Court of Appeals on its [defendant in error's] own appeal to said Circuit Court of Appeals.

Elaboration of the demerits of this application is unnecessary before this court.

LIZZIE M. TROXELL,
Administratrix.

By her Attorney:

GEORGE DEMMING,
Plaintiff in Error.

STATE OF PENNSYLVANIA, } ss.:
 COUNTY OF PHILADELPHIA, }

George Demming, being duly sworn according to law, deposes and says that he is the attorney of record for the plaintiff in error in the foregoing case, and that the facts set forth in the foregoing answer to the petition of defendant in error are just and true, to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 21st day of December, A. D. 1912. } (Signed)
 GEORGE DEMMING.

(Signed)

GEORGE KOPPENHOEFER, JR.,

(Seal)

Notary Public.

My commission expires March 10, 1913.

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IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

An action in trespass brought in the former Circuit Court for the Eastern District of Pennsylvania under the Railroad Employers' Liability Acts of Congress of 1908 and 1910, by the widow, appointed administratrix, on behalf of herself and two minor children, to recover damages for the alleged wrongful killing of her husband by reason of the negligence of the employing railroad company, its servants and employees.

STATEMENT OF THE CASE.

The plaintiff in error, Lizzie M. Troxell, is the widow of Joseph Daniel Troxell, deceased. Joseph Daniel Troxell, aged twenty-three, and of perfect physique and health, had been employed by the defendant in error, the Delaware, Lackawanna and Western Railroad Company, in the capacity of a locomotive fireman. Shortly after 7 o'clock on the morning of Wednesday, July 21, 1909, while attending to his ordinary duties as fireman on his engine, which was pulling a freight train containing interstate and foreign commerce, just beyond Belfast Junction, near the town of Nazareth, Northampton County, Pennsylvania, Troxell was instantly killed by his train colliding head-on with six gondola cars, loaded with ashes, running wild on a steep down grade at a speed estimated at about fifty miles an hour.

It is not necessary to go into the details of this accident. It is sufficient to say that Troxell's duties in no way entered into the care of these runaway cars; that these cars, after being allowed to stand (with one shifting by a yard crew) for forty-eight hours on a siding near a town called Pen Argyl, Pennsylvania, on defendant in error's railroad, had escaped and run away of their own volition, with no one near them at the time, and had gone for a distance of six miles down the main track before colliding with Troxell's train coming in the opposite direction. Conclusive evidence (at least for a jury) was offered at the trial of the present case by plaintiff in error showing that defendant in error was negligent, through its employees and servants, in

improperly and carelessly placing these cars on this siding, thereby allowing them to escape and run away.

By reason of the great confusion existing at the time, the uncertainty whether the Railroad Employers' Liability Act of Congress of April 22, 1908, was constitutional, or, like its predecessor, unconstitutional, and the long length of time that would elapse before the Supreme Court of the United States could pass upon its constitutionality, the widow, plaintiff in error, acting individually (as is the law in Pennsylvania, the scene of the accident and the death), previously brought a common law action in the Circuit Court for the Eastern District of Pennsylvania, as of April Sessions, 1909, No. 694, based upon diverse citizenship (she being then a citizen of New Jersey) and sought to recover damages from the defendant in error. At the trial of this case it appeared that defendant in error, at the time of the accident complained of, was carrying interstate commerce on Troxell's train, but for the reasons above stated and the further fact that neither plaintiff in error nor any one else had at that time taken out letters of administration on the dead man's estate, plaintiff in error elected to try her common law suit and to recover, if possible, thereon. This was absolutely and unqualifiedly so understood on all sides at the time, and is fully shown by the record of that action, the trial judge's charge, the recorded statements of counsel, etc. By reason of the law of Pennsylvania not allowing any recovery in trespass actions for the negligence of fellow-employees no attempt was made at this trial to show negligence of railroad workmen in im-

properly placing these cars on this siding. The sole reliance of plaintiff in error at the trial of this first and common law action was upon the failure of defendant in error to install and use on the siding in question a simple, ordinary and universally employed device and apparatus, viz: a derailing switch, which would have prevented these cars from running away and getting on the main track.

The jury found a verdict for some eight thousand dollars in favor of plaintiff in error. Upon appeal to the Circuit Court of Appeals for the Third Circuit, as of October Term, 1910, No. 45, this verdict was reversed and judgment ordered to be entered for the defendant in error, mainly upon the ground, as would appear from the opinion, that a derailing switch is a new-fangled device and that there is no act of Congress requiring railroads to install them. This decision is reported in 183 Federal Reporter, 373.

Thereupon, the widow took out letters of administration upon her dead husband's estate, and went back to the Circuit Court and instituted a new and second suit as administratrix, under, and in accordance with, the requirements and provisions of the so-called Railroad Employers' Liability Acts of Congress of April 22, 1908, and April 5, 1910.

At the trial of this second suit most of the testimony introduced by plaintiff in error and her main reliance to prove negligence upon the part of defendant in error was to the effect that the employees of defendant in error carelessly and negligently placed these six cars on this siding, thereby allowing them afterwards to run

out of their own volition. This evidence was not introduced into the trial of the first and common law suit brought for the simple reason that, under the law of Pennsylvania and under the common law, there can be no recovery in a trespass case for negligence of fellow-workman. It is only under the broad provisions of the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910 that a workman, or his widow, employed on and about a railroad engaged in interstate commerce, has a right to recover for the negligent actions of his fellows resulting in injury or death to himself. Such evidence, and a possible recovery based thereon, was not, and could not have been, an element or a part of the trial or record of the first and common law action brought.

Evidence with regard to the necessity for defendant in error to install and maintain a derailing switch on this siding, and that such devices were in ordinary and customary use at the time, was also introduced at the trial of the second suit, but at the conclusion of all the testimony the learned trial Judge below struck out and took from the consideration of the jury all evidence relating to the absence of a derailing device on this particular siding, and the necessity for one there, together with all evidence as to the practice of installing derailing devices, and the custom thereto, declaring that this had all been adjudicated adversely to the plaintiff in error by the decision of the Circuit Court of Appeals in the former and common law suit. The only question therefore left for the jury's consideration was the one of fact whether these cars had been negligently and

improperly placed on the siding by the yard crew, and left to remain there. This is clearly shown by the judge's charge and other parts of the record. (Pages 298 to 304.)

The jury found a verdict for the administratrix in the sum of \$10,196.50.

Upon an appeal by the defendant in error from the judgment of the Circuit Court to the Circuit Court of Appeals for the Third Circuit, the Circuit Court of Appeals reversed this verdict in favor of plaintiff in error, and directed judgment to be entered instead in favor of defendant in error, upon the ground that the judgment of the Court of Appeals in the first and common law action was *res judicata* of this second action brought squarely under and by reason of the provisions and requirement of the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.

The only question involved, therefore in the present writ of error is: Is the judgment rendered in the first suit, brought and tried in accordance with the principles of the common law and the law of the State of Pennsylvania, where the accident and death occurred, *res judicata* of the second suit brought and tried in accordance with the provisions and requirements of, and the cause of action given by, the Acts of Congress relating to the liability of common carriers by railroads to their employees in certain cases, approved April 22, 1908, and April 5, 1910?

ASSIGNMENTS OF ERROR.

First.—The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the Circuit Court for the Eastern District of Pennsylvania.

Second.—The Circuit Court of Appeals for the Third Circuit erred in directing said Circuit Court to enter judgment in favor of the defendant.

Third.—The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said Circuit Court.

Fourth.—The Circuit Court of Appeals for the Third Circuit erred in holding that the record in the case of Lizzie M. Troxell, individually, against The Delaware, Lackawanna and Western Railroad Company was *res judicata* of the issue in this cause, because:

(a) Said record was not before the Circuit Court of Appeals.

(b) The judgment in said suit did not constitute *res judicata* of the issue in this cause.

Fifth.—The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said Circuit Court in the present case and embodied in the judgment entered by that court by a method otherwise than according to the rules of common law, to wit, by holding that a certain judgment rendered in another cause was *res judicata* of the issue in this cause when the said judgment and the record thereof were not part of the record in the Circuit Court of Appeals, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States of America.

ARGUMENT.

In presenting her argument plaintiff in error will take up in order and elaborate upon the following sub-heads:

The Circuit Court of Appeals for the Third Circuit was in error in holding the judgment of the first cause res judicata of the second cause for the reasons:

1. *The record of the first cause was not part of the record of the second and present cause and was therefore never properly before the Circuit Court of Appeals.*

2. *The first cause was brought, tried, reviewed, treated and adjudicated entirely as a common law action, whereas the second cause was brought, tried and treated as an action based upon the provisions and cause of action given by the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.*

3. *The judgment in the first suit was not, and could not be, res judicata of this present suit because*

(a) *The parties in the two actions were different.*

(b) *The cause of action of the two suits was different.*

(c) *The essential and vital question, or fact, in the second and present action was not actually and directly in issue and passed upon or decided in the first action.*

The First Action Cannot Be Held Res Judicata of the Second or Present Action Because the Record of the First Action Was Not Part of the Record of the Second or Present Action.

It is submitted that the action of the Circuit Court of Appeals in holding the judgment of the first suit *res judicata* of the second or present suit was plain error because that court did so *without having before it in any proper or legal form the record of the judgment of the first suit.*

On the appeal of the present case by the defendant in error to the Circuit Court of Appeals the record was in the present form as it is before this Court (without, of course, the proceedings before the Court of Appeals), and in no manner contained the record of the first or common law action.

Yet the Court of Appeals, in delivering its decision of *res judicata* in the action now before us apparently used and referred to this record of the first case, and also used and referred to its opinion in the former action as printed in 183 Federal Reporter, 373, without such record and opinion being in any way part of the record of this cause.

In so deciding the present case and holding that a judgment of another cause, no part of the record of this cause, was *res judicata*, of this cause, plaintiff in error contends that the Circuit Court of Appeals of the Third Circuit committed a grave error, and that, by so doing, it re-examined facts found by a jury in the Circuit Court below in the present case, which facts were embodied in the judgment entered by the Circuit Court below in the present case, by a method and

process other than according to the rules of common law and in express violation and infraction of the directions and requirements of the Seventh Amendment to the Constitution of the United States.

What was meant by the "common law" in its application to such cases was early decided.

United States vs. Wonson, 1 Gallison's Rep.
20 (1812), Story J. (Circuit Court of
the First Circuit.)

The record alone furnishes the only proper proof of what occurred at the first trial.

Fayerweather vs. Ritch, 195 U. S. 306
(1904).

The Court of Appeals rested its decision expressly upon the alleged fact of *res judicata*. In so doing, it was compelled to import into the record something that was not there. On the trial of the case, there was offered in evidence, under objection and exception, the record of a former suit by Lizzie M. Troxell, suing in behalf of herself individually as the widow. The minutes of the stenographer purport to show that this record was offered in evidence, but it was not made part of the bill of exceptions and does not appear as a part of the record in the Circuit Court of Appeals, or in this court; and this court will look in vain for any trace in the record of the present case of the record of the former action. Indeed, by the written direction of counsel for defendant in error, only certain papers were made part of the record, and in accord-

ance with this direction, no inclusion of any such alleged record is asked. There is no evidence whatever in this court, and there was no evidence in the Court of Appeals, showing that this record, as a matter of fact, was ever made part of the record of the proceedings in the District Court. At all events, it is certainly not part of the record here, nor was it part of the record in the Circuit Court of Appeals.

Notwithstanding this fact, the Circuit Court of Appeals seems to have gone on the theory that because its *opinion* in the case of *Delaware, Lackawanna & Western R. R. Co. vs. Troxell*, 183 Fed. 373, was a reported case, such fact made it appear as part of the record in this cause. It is unnecessary to advert to the consideration, which will be made sufficiently clear by the argument as to the lack of identity of the issues and of the parties in these two cases, that essential and important facts necessary to the determination of the question of *res judicata* require that the entire record of the case alleged to constitute *res judicata* should be before the court. Judicial knowledge of a fact may extend to a good many things, but it can hardly extend to remembering the record and all the details of a record necessary to determine whether the issues and parties are identical with another suit.

“Nothing will be error in law that does not appear on the face of the record.”

Stephens on Pleading, page 144 (Tyler).

It is, however, a work of supererogation to argue this question upon first principles. This court has very

clearly and emphatically disposed of the fact here raised in the case of

Pacific R. R. of Mo. vs. Missouri Pacific Ry. Co., 111 U. S. 505 (1884).

In that case, in the bill in equity, it was stated: "Your orator prays liberty to refer to the files and records of said United States Circuit Court in the case of *George E. Ketchum vs. Pacific Railroad et al.*, to show, etc."

This Court said: "There is not in the record on this appeal, any stipulation that the Ketchum record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the Circuit Court. . . . One of the assignments of error, on this appeal, is that the Circuit Court considered matters outside of the record, and matters not embraced in the bill. We are of the opinion that this court cannot consider anything which is not contained in the bill, and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill."

The principle that judicial notice cannot be taken of court proceedings in a suit other than the one in which such proceedings occur is recognized in many decisions. Among others in the cases of

Fitzgerald vs. Evans, 49 Fed. 426 (1892);
In re Manderson, 51 Fed. 501 (1892).

In *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212 (1902), the exact question presented in this case arose. The case was much weaker than the one at bar because the question presented was a question of law and the substantive questions of law were really the same in each case. This Court, however, said that the record of the former case not being before the court, it could not treat such decision as *res judicata*. It said, however, that on the questions of law involved it could, on the principle of *stare decisis*, follow the same legal reasoning. As a matter of fact, however, the court carefully re-examined the legal principles controlling. In the case at bar, however, the question of law in the former case was admittedly wholly different from the question of law presented in the case at bar. This case is therefore direct authority that the question of *res judicata* is not a question of judicial notice.

The Present Case Is Not Res Judicata Because the First Action Was Brought, Tried, Reviewed, Treated and Adjudicated Throughout Entirely as a Common Law Action and One Brought Under the Law of Pennsylvania, While the Second and Present Action Was Brought, Tried, Treated and Adjudicated Flatly and Solely as an Action Based Upon the Provisions and Cause of Action Given by the Federal Railroad Employers' Liability Acts of Congress of 1908 and 1910.

If this court decides that the record of the first action brought is before it, an investigation of the records of the two actions will show conclusively that

the above statement is true. At the trial of the first suit it was thoroughly understood and agreed between counsel and by the trial Judge that the action was to rest entirely upon the common law principles of negligence as enforced and interpreted in Pennsylvania, the scene of the death and of the trial. All the evidence was introduced in accordance with this understanding, and in the charge of the trial Judge to the jury *nothing whatsoever was left to the jury's consideration except the one matter of the possible negligence of defendant in error in not installing and maintaining, in accordance with ordinary and customary usage, a derailing switch and device on the siding from which these six cars ran away.* The very important matter of the negligence of fellow-employees in carelessly placing and continuing these cars upon this siding—for which negligence there is no recovery under the common law of Pennsylvania, but a recovery for which is provided for under the liberal terms of the Railroad Employers' Liability Act of Congress of April 22, 1908—was expressly and explicitly kept from the jury's consideration. This latter element, therefore, in no way entered into their deliberations and the resultant verdict, nor did it enter into the judgment afterwards taken upon this verdict.

Now, in doing all this, counsel for plaintiff in error, although possibly mistakenly so, was actuated by the best of motives on behalf of his client—a destitute widow with two infant children. The Federal Railroad Employers' Liability Act had at that time been passed, but there seemed to be general doubt and perplexity whether or not it would be held to be unconstitutional like its predecessor. Many of the courts, especially

those of the eastern section of the country, were pronouncing it unconstitutional, notably that of Justice Simeon E. Baldwin, of the Supreme Court of Errors of Connecticut, the decision of which court came out about this time. There was very grave doubt whether the courts of Pennsylvania and the Circuit Court of Appeals of the Third Circuit would sustain its constitutionality. Counsel for plaintiff in error took a trip to Washington for the express purpose of ascertaining the condition of the docket of the Supreme Court of the United States, and learned there that a congested list of some eight hundred odd cases and a period of about three years, in the regular order of events, stood between the Supreme Court and an opportunity to decide upon the constitutionality of the Act.

The result of all this was that counsel for plaintiff in error determined, if possible, to avoid all this trouble, this uncertainty and delay in a case of this nature, and determined further that the case was sufficiently strong to sustain a recovery under the common and statutory law and principles of negligence as in force and applied in Pennsylvania.

The suit was therefore thus brought, thus tried and thus determined, and there was a full understanding between counsel on both sides and trial Judge as to the reason for this. Counsel for defendant in error always maintained and, at the trial of the second action brought, strenuously insisted that the Act of Congress of April 22, 1908, was unconstitutional.

And when the first suit was appealed to the learned Circuit Court of Appeals and there reversed, that tribunal in not the slightest way indicated that its reversal was based upon a consideration of the application to the case of the provisions of the Act of April 22, 1908. On the contrary, a careful perusal of the opinion given

by that court will convince any one that its reversal was based solely upon common law and Pennsylvania statutory law principles. The opinion begins with these very significant words: "This action was instituted by Lizzie M. Troxell, as the widow, . . . *under the Pennsylvania statute*, to recover damages, etc." And then the court proceeds to reverse the judgment of the court below, mainly upon the logic and law of a case of the Supreme Court of Appeals of Virginia, decided nearly ten years ago. Moreover, at the time of the argument of the first action before the Circuit Court of Appeals, in the presence of counsel for defendant in error, the court made the suggestion that letters of administration be taken out and a new action brought under the Act of Congress.

The only point considered by the Court of Appeals was that of the duty and necessity of the defendant in error under the common law to install and maintain a derailing switch. And in deciding that there was no such duty and compulsion, despite the testimony that this was a device in long and ordinary use, and holding that the widow could not therefore recover, the Circuit Court of Appeals utterly failed to regard and treat the case through the broad precept of the Act of Congress of April 22, 1908—"death resulting in whole or in part from the negligence . . . by reason of any defect or insufficiency."

So that there can be no manner of doubt that the first action was brought, tried and adjudged by the lower court, and reversed by the Court of Appeals, entirely under the Pennsylvania common and statutory law of negligence.

Equally true is it that the present and second action by Lizzie M. Troxell, administratrix, was begun, tried, treated and determined, purely and completely,

as an action brought under the provisions of the Railroad Employers' Liability Act of Congress of April 22, 1908. The only matter left to the jury's consideration by the arguments of counsel and by the explicit directions and charge of the learned trial Judge was, whether or not the servants of defendant in error—the fellow-servants of the deceased—had been guilty of negligence which resulted in the accident complained of. (Pages 293 to 303 of the Record.) This was a matter, as carefully stated by the trial Judge, which had not been passed upon in the first action, for which there was no recovery under the common law or under any statute in Pennsylvania; and the consideration of every other possible point of negligence in the case, particularly that of the failure to install and maintain a derailing switch, was carefully, clearly and unqualifiedly kept from the jury. (Pages 293 to 298.)

It is therefore apparent that, no matter what the law may be with regard to concurrent jurisdiction by the federal courts over the law of the states and Acts of Congress, the indisputable fact is that in only one of these two actions—the present or second one—did plaintiff in error receive the benefit of the provisions of the Railroad Employers' Liability Act of Congress of April 22, 1908. Under such circumstances can the first action be said to be *res judicata* of the present one?

In the first action the trial Judge expressly held that all averments in the statement of claim and any evidence therein relating to interstate commerce were mere surplusage, and confined the trial and consideration of the case exclusively to principles of the common law as defined in Pennsylvania.

He held that the Circuit Court had concurrent jurisdiction so to try the case under the supposed authority of:

Allen vs. Tuscarora Valley R. R. Co., 229 Pa. 97 (1910);

Claffin vs. Houseman, 93 U. S. 136 (1876);

Cross vs. North Carolina, 132 U. S. 139 (1889);

United States vs. Arjona, 120 U. S. 487 (1887);

Burgess vs. Seligman, 107 U. S. 20 and 33 (1882);

Kuhn vs. Fairmount Coal Co., 215 U. S. 360 (1910).

In the case of

Yates vs. Utica Bank, 206 W. V. 181 (1907),

this Court, in sustaining the right of a lower court to try a case on part of the declaration and holding that, if so done, the case is not *res judicata* of a subsequent case where all the averments are availed of, says:

“In so deciding the court expressly held that the averments in the petition relative to the fraud and deceit claimed to have been practiced upon the plaintiff through reports to the Comptroller of the Currency were mere matter of inducement or surplusage, and did not constitute averments of a substantive cause of action. In other words, the previous case was decided exclusively upon the ground that, as the plaintiff had not set up any individual wrong suffered by him, but solely an injury sustained in common with all other creditors of the bank, the resulting damage was only recoverable by the receiver.”

This Court has held that, in order to ascertain exactly the point that was determined in the first issue, it will consult the trial judge's charge as shown by the record.

De Sollar vs. Hanscome, 158 U. S. 216 (1895).

By reference to the record of the first cause it will be found that the trial Judge in his charge confined

the jury to a consideration merely of the common law and Pennsylvania statutory law principles as applicable to the facts of the case; while in the present action the same trial judge confined the jury, by his charge, to the consideration of the negligence of fellow-workmen.

It therefore would appear to be unquestionable that the precise question and claim passed upon in the first action was not the same as that of the present action.

The Case Is Not Res Adjudicata Because the Parties, the Cause of Action and the Essential Questions of the Two Actions Are Different.

The present case is not adjudicated by the former decision on the common law action for the reason that the former suit and the present one are not one and the same, inasmuch as (1) **THEY ARE NOT BETWEEN THE SAME PARTIES**; (2) **THEY ARE NOT BASED UPON THE SAME CAUSE OF ACTION**, and (3) **THE ESSENTIAL FACT OR QUESTION ARISING IN THE SECOND AND PRESENT ACTION WAS NOT DIRECTLY IN ISSUE AND PASSED UPON IN THE FIRST ACTION**.

These three reasons are somewhat involved and related to each other. Let us therefore regard the general subject for a moment.

The rule is stated as follows:

“A fact, or question, which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in

any further action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

Cyc. Vol. 23, page 1215.

This is the doctrine in Pennsylvania.

Grier Brothers vs. Assurance Co., 183 Pa. 343;

Stradley vs. Bath Portland Cement Co., 228 Pa. 113;

Murphy vs. Matthews, 43 Pennsylvania Superior Court, 289.

This also is the recognized rule of the Supreme Court of the United States.

Lander vs. Mercantile Bank, 186 U. S. 458 (1902).

A particular subject-matter is not, therefore, *res judicata* unless it is between the "same parties."

There can be no question that the party in the present controversy, viz., "Lizzie M. Troxell, Administratrix," is not the same party as the plaintiff in the former suit, viz., "Lizzie M. Troxell," who sued as an individual.

But that there may be no doubt about this, let us see what the courts have to say as to the similarity or difference existing between a party acting individually and acting as administrator.

In Vol. 23 of Cyc., page 1243, it is said:

"A party is not bound by a former judgment, when he sued or defended one action in an indi-

vidual capacity and in the other in the character of executor or administrator."

In the case of

Brown vs. Fletcher's Estate, 210 U. S. 82
(1908),

this Court decides that an executor in one jurisdiction is not in privity with an ancillary administrator in the same estate in another jurisdiction, and a judgment against one is not *res judicata* and a bar to a suit by another.

Vide also,

Ingersoll vs. Coran, 211 U. S. 336 (1908).

And again, in the case of

Yates vs. Utica Bank, 206 U. S. 181 (1907),

this Court decides that the judgment of dismissal, based on the ground that plaintiff, in an action against directors of a national bank, had not set up any individual wrong suffered by him, but solely an injury sustained in common with all other creditors of the bank, is not *res adjudicata* of a right of action between the same parties to recover for individual loss suffered as distinct from the right of the bank.

Again, in the Pennsylvania case of

Garman vs. Glass, 197 Pa. 101 (1900),

the Pennsylvania Supreme Court, deciding that a change of parties which involves a change in the cause of action is not within the ordinary province of amendments, held that for a plaintiff to substitute himself

personally as plaintiff, instead of himself as administrator, could not be allowed.

In the case of

Wildermuth vs. Long, 196 Pa. 541 (1900),

the Pennsylvania Supreme Court, upholding the same doctrine, would not permit a plaintiff to substitute himself as heir at law, instead of as administrator.

This reasoning the Pennsylvania Courts uphold in many decisions:

Pennsylvania Railroad vs. Spicker, 105 Pa. 142 (1884);

Pennsylvania Railroad Co. vs. Eby, 107 Pa. 166 (1884);

Lightner's Estate, 187 Pa. 237 (1898);

Walker vs. Philadelphia, 195 Pa. 168 (1904).

But, says the Circuit Court of Appeals in its decision, the widow suing in her own name is practically the same as the widow suing as administratrix, and, in either event, the same parties are benefited. *The Circuit Court of Appeals then goes on to say that, although defendant in error did not raise the point that plaintiff in error did not sue as administratrix in the first action, yet, if it had done so, probably the court below would have made plaintiff in error so amend and then proceed. That is to say, this part of the opinion of the Circuit Court of Appeals is based upon a supposition which in turn is based upon another supposition, neither of which occurred, and both of which involved substantial rights of plaintiff in error. How can the court say this with propriety or accuracy?*

The very same argument was advanced in the Pennsylvania case of

Bridget Riley vs. Insurance Co., 12 Pa.
Superior Ct. 565 (1900).

In that case exactly the same question arose as here, viz.: Is a widow suing in her own name the same party as the same widow suing as administratrix?

In refusing to affirm this doctrine the court there said:

"It is very clear that, under the terms of the policy, Bridget Riley, the original plaintiff, had no right to recover, and this is practically conceded by her counsel. It is alleged, however, that Bridget Riley, being the widow of the decedent, is the principal beneficiary of his estate, and that the administrator is her representative, and that the amendment is purely technical, and, whether a recovery be had in the name of the widow as such, or as administrator, makes no practical difference to the plaintiff. From the standpoint of the plaintiff this may or may not be true. We have no evidence upon the subject. *The condition of James Riley's estate is not shown and whether the money, if recovered in this action, would go to creditors or parties beneficially interested as heirs does not appear and, in our view of the case, is immaterial.*

"Bridget Riley, as appears by the evidence, acquired her right to maintain the suit as administratrix on the day upon which the amendment was allowed. *The amendment offered was to introduce an entirely new party as plaintiff, as much so as if letters of administration had been granted to John Doe and the offer had been to substitute him as administrator in place of Bridget Riley. The allowance of the amendment introduced as a party to the suit, one who had no right to recover under the terms of the policy.*"

This doctrine is well known in Pennsylvania and has been enforced to the utter discomfiture of plaintiffs in negligence actions time and time again.

The Pennsylvania statute giving the right to a widow to sue in her own name for the death of her husband is as follows:

“Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.”

Act of April 15, 1851, Section 19, P. L. 674.

In construing this statute and deciding that a widow as administratrix is a different party from the same widow suing individually the Supreme Court of Pennsylvania says in the case of

La Bar vs. New York, Susquehanna & Western R. R. Co., 218 Pa. 263 (1907).

“The husband of appellant, a locomotive fireman in the employ of defendant company, was killed by the explosion of the engine boiler, on December 24, 1905, in the state of New Jersey. This action was brought in the court of common pleas of Monroe County, this state (Pennsylvania), August 13, 1906, by his widow, the appellant here, in her own right. When the case came on for trial February 13, 1907, counsel for plaintiff made a motion to amend the pleadings by adding the name of Catherine La Bar, administratrix of Charles D. La Bar, deceased. The learned trial judge permitted the record and pleadings to be so amended under exceptions, but the next day, after full consideration, an order was made to

strike off the amendment on the ground that it introduced a new cause of action barred by the statute of limitations, and therefore not allowable. It is authoritatively settled in this state that when a suit is brought for injuries resulting in death, the action must be instituted in the name of the persons, or personal representatives, to whom the right of action is given by the statutes of the state in which the injuries were inflicted and the death occurred. The action being transitory, the comity existing between different states will enforce rights of a statutory origin where jurisdiction of the parties is acquired by the courts here. In such a case, however, the courts of this state will only enforce the rights of the parties according to, and as defined by, the *lex loci*. This is the established rule in Pennsylvania. *Usher vs. Railroad Company*, 129 Pa. 206. In order to have complied with this rule the present suit should have been brought by the administratrix of the estate of the decedent for the benefit of his widow and children. It was not so brought. The plaintiff sued in her own individual right, and so the case stood until the time of trial. It is conceded that without the amendment the appellant cannot sustain her action, hence the only question to be determined is whether the learned trial judge erred in striking off the amendment to the pleadings. Unless the amendment is allowed the right of action does not exist in the plaintiff. The answer to this question depends upon whether a new cause of action was introduced or new parties were permitted to intervene. It has been many times decided that a new cause of action cannot be introduced, or new parties brought in, or a new subject-matter presented, or a vital and material defect in the pleadings be corrected, after the statute of limitations has become a bar. *Grier vs. Assurance Co.*, 183 Pa. 334, etc.

"The learned counsel for appellants seeks to avoid the application of the rule announced in these cases by insisting that the beneficiaries entitled to receive the moneys that might be recov-

ered in this case are practically the same under the statutes of Pennsylvania and New Jersey, and, therefore, no injury is done the parties to this suit. This contention cannot be sustained under the rule of our cases. In Usher vs. Railroad Company, supra, the present chief justice, in discussing the precise question, said: 'At the outset we may say that the action can get no support from the fact that a closely similar statute in this state gives the right to sue, expressly and exclusively, to the widow, if there be one, for the benefit of herself and her children.' This whole question was fully considered in that case, the contention there made in this respect being on all fours with the argument here, and the conclusion was reached that it would be pushing the comity, which undertakes to enforce in this state a right of action which accrued in another state, beyond its legitimate bounds, to assume to do for other tribunals what they would not do for themselves. In other words, as applied to the facts of the present case, if the suit had been brought in New Jersey the personal representative of the deceased husband would be required to bring it, and not the widow in her own individual right, and this is equally true when the suit is brought in our state. It was not so instituted, and it is too late to amend the record so as to make the personal representatives of the decedent a party to the record, as required by the New Jersey statute, after the statute of limitations had become a bar, because this in legal effect introduced a new cause of action by the substitution of different parties."

To the same effect as above are the Pennsylvania decisions of

Hoodmacker vs. Lehigh Valley R. R. Co., 218 Pa. 21 (1907),

and

Bender vs. Penfield, 235 Pa. 58 (1912),

and also

Clark's Appeal, 70 Conn. 195 (1898);
Hukm. Chand., Res Judicata, 158 et seq. and
179;

Gibson vs. Willis, 36 S. W. Rep. 154 (Tenn.).

Although this exact point does not seem to have been passed upon by this Court, yet it was said by this Court, quoting the words with approval, in the case of

Brown vs. Fletcher's Estate, *supra*.

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator, nor does the authority of the administrator extend to the property here or to the doings of the executor."

And so in the present case, although Lizzie M. Troxell, as an individual, has been held in the former common law action to have no right of recovery, yet Lizzie M. Troxell, administratrix here, is an entirely new and different party, has no privity with Lizzie M. Troxell as an individual, and should, therefore, be allowed to retain her recovery.

In the first action brought Lizzie M. Troxell was accountable to no one but herself for the money she might recover; in the present action Lizzie M. Troxell, administratrix, is accountable to the Orphans' Court, or Probate Court of Pennsylvania, for any sum of money she may receive, and distribution is made by that court. There is therefore no privity between the two.

“A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is, in contemplation of the law, a distinct person and a stranger to the prior proceedings and judgment.”

“The judgment rendered in an action in which one of the parties appeared in the capacity of an executor or administrator is not binding upon him in a subsequent suit, in which he appears in his private and individual capacity, or as an heir, legatee or trustee under the will, or vice versa.”

Black on the Law of Judgments, Vol. 2, Sect.
536 (2nd Ed.).

It has even been held that successive administrators are not privies in legal contemplation, and a judgment in favor of an administrator is not a bar to an action against his successor by the same plaintiff for the same cause.

Hummel vs. First Natl. Bank, 32 Pac. Rep.
72 (1892) (Col.).

“The relationship of privity does not exist at common law between administrator or executor and heir or devisee so as to make a judgment

against the defendant's representative binding upon the lands of the heir or devisee. . . . An administrator is in privity with his intestate in respect of the personalty; and an executor is in privity with the deceased to the extent to which by the terms of the will he succeeds to the position of his testator. So too the heir and the devisee are in privity with the ancestor or devisor."

Bigelow on Estoppel, Sec. 111, pages 146 to 148, (5th Ed.).

It is thus clearly seen that the parties to the two suits are entirely different. It is hardly necessary to go further to the comparison of the subject-matter of the two controversies, since, whether the subject-matter is the same or not, if the parties are different, there can be no *res adjudicata* between the two suits. But, to complete the argument, it can be just as clearly shown that the subject-matter and the cause of action of the two suits is entirely different and in nowise the same.

This Supreme Court of the United States has said:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon

such matters is the judgment conclusive in another action."

Cromwell vs. Sac County, 94 U. S. 351;
(1876);

Northern Pacific Railway Co. vs. Slaght,
205 U. S. 122 (1907);

Virginia-Carolina Chemical Co. vs. Kirven,
215 U. S. 257 (1909).

The rule is stated to be as follows:

Cyc., Vol. 23, page 1302:

"The general rule is that a judgment is conclusive for the purposes of a second action between *the same parties* or their privies, of all facts, questions or claims *which were directly in issue and adjudicated*, whether the second suit be upon the same or a different cause of action."

Again, in

Cyc., Vol. 23, page 1304,

it is said:

"The great preponderance of authority sustains the rule that the estoppel of a judgment covers all points *which were actually litigated and which actually determined the verdict or finding*, whether or not they were technically at issue on the face of the pleadings. *But a matter is not in issue in the suit which was neither pleaded nor brought into contest therein*, although within the general scope of the litigation, and although it might have determined the judgment if it had been set up and tried."

The first suit was upon the common law right of action and was so tried. The second suit rests upon

the plaintiff's right to recover as administratrix under the provisions of the Railroad Employers' Liability Acts of Congress of 1908 and 1910, and is squarely so placed. The provisions of these Acts certainly and clearly make a suit based upon them an entirely different cause of action from a suit based upon the common law. The principles upon which a suit is decided, based upon these Acts, are much wider and more generous than those of the common law. These Acts do away with the doctrine of the "assumption of risk"; they establish that contributory negligence on the part of the plaintiff, or the plaintiff's deceased, shall not be a total bar to recovery, as the common law provides, but shall only diminish the damages recovered in proportion to the amount of contributory negligence proven and attributable to the plaintiff. *They allow a recovery as in the present case, for negligence of fellow servants.* These Acts also provide, contrary to the common law, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void." These Acts also provide that "for such injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," there shall be a recovery. All these are provisions totally unknown to and disregarded by the common law.

So that there seems to be no question or doubt that the issues of fact, as raised by this second suit, are totally different and distinct from the issues as raised by the first suit, and that, therefore, the subject-matter of the two suits is not the same, and a judgment in one suit is not *res adjudicata* of the other suit.

In the first suit the only matter or fact introduced, tried and adjudicated was, whether or not defendant in error was guilty of negligence in not installing and maintaining an apparatus or device known as a derauling switch. In the second suit the one subject-matter or fact testified to, tried and adjudicated was, whether the servants and employees of defendant in error were guilty of negligence. This second matter or fact could not have been passed upon and adjudicated in the first action, and, as a matter of fact, was not actually passed upon and adjudicated, as the action was clearly tried under the common law, and a recovery for injuries caused by the negligence of fellow servants is unknown and impossible under the common law and the laws of Pennsylvania. Therefore, this fact, i. e., the negligence of fellow servants, was not actually litigated in the first action, and in no wise entered into the verdict or finding or judgment of the first action. It was only litigated and actually passed upon and determined in the second and present action.

But, says the Court of Appeals, even if the question of the negligence of fellow employees was not passed upon in the first action, and thereby adjudicated, we must hold, by reason of the decision of this Court in

Mondon vs. New York, New Haven and
Hartford Railroad Co., et al., 223 U.
S. 1 (1911),

that, Congress having acted and passed these Acts, the Circuit Court below had no concurrent jurisdiction to try any other suit based upon the facts of this case other than a suit brought and tried in accordance with the provisions of these Acts. In other words, these Acts having been passed, it is impossible to bring and try any suit under the common law.

We are obliged, therefore, reasons the Court of Appeals, to consider the first suit as having been brought and tried under the Act of Congress.

But such reasoning does a most palpable injustice to the plaintiff in error, because it does not alter the circumstance that, as a matter of fact, the only thing sought to be adjudicated, and the only thing actually adjudicated in the first action, and the only thing upon which the Court of Appeals entered its formal judgment of reversal against plaintiff in error in the first action, was the alleged negligence in failing to install and maintain a derailing switch.

That was all that was actually adjudicated in the first action. In the second and present action what was actually adjudicated was the alleged negligence of fellow servants,—a question or fact totally different

and disconnected from the question or fact passed upon and adjudicated in the first action.

In addition to this there was no point raised by defendant in error, no controversy or dispute, at the time, that the lower court had no authority or jurisdiction to try a common law action. Every one appeared to agree to it, and it was so understood, *and it actually occurred*. Can it now be justly said that the fact was otherwise. Does not the situation, rather, resolve itself into this, that the first trial, so far as the rights of the parties are concerned, was a nullity and no trial at all?

The rule is clear that the estoppel of a judgment covers only the points *which were actually litigated and which actually determined the verdict or finding*.

Cyc., Vol. 23, page 1304, *supra*.

The question of the negligence of fellow servants was not actually at issue, nor was it set up and tried, in the first suit. Therefore the first suit cannot be *res adjudicata* of the second and present suit.

Even if the Circuit Court had no jurisdiction to try a common law action, the Act of Congress of April 22, 1908, then being upon the statute books, as the Court of Appeals contends, the only thing, fact and question sent to the jury, and which the jury was permitted to pass upon, and upon which was predicated its verdict and the subsequent judgment thereon, was as to the negligence of defendant in error in failing to install and maintain a derailing switch, and no other fact and question. The question of the negligence of fellow employees was only set up, passed upon and

adjudicated at the second trial. So far, therefore, as the Act of Congress of April 22, 1908, is concerned, the first trial was a deficient trial, an absolute nullity, deciding nothing and adjudicating nothing.

In the first action, too, plaintiff in error throughout was perfectly consistent with her present attitude. When her verdict was reversed by the Court of Appeals, she presented to this court a petition for a writ of certiorari to review this decision, which petition was refused. If the fiction is correct that this first action must necessarily have been brought under the Act of Congress, then plaintiff in error was deprived of a substantial right in not having this court pass upon the first proceedings.

The true test seems to be: "Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action."

Black on Judgments, Vol. 11, Sec. 726 (2nd Ed.);

Herman on the Law of Estoppel, Vol. 1, Sec. 96.

In Lizzie M. Troxell's action the only evidence left to the jury's consideration was that referring to the negligence of defendant in error in not equipping and keeping on this siding a derailing switch; and in the action of Lizzie M. Troxell, administratrix, the only evidence given to the jury for its consideration was that relating to the negligence of fellow workmen

in not properly placing and securing these six cars on the siding.

"The conclusive effect of judgments *in personam* depends upon the fact of whether the same point was in issue in the former action. The rule as laid down in the Duchess of Kingston's case is the well settled rule of all countries, that judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are not only between the same parties, but also upon the same matters coming in question and directly upon the point. A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it. Parties are not allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed it is final as to the points decided, but not in respect to matters which the record itself shows were not in question, and therefore when a cause has gone off for some defect, which precluded an inquiry into its merits, the judgment is usually no bar to a second action.

Herman on the Law of Estoppel, Vol. 1,
Sec. 105.

"Cases not infrequently arise in which a party, acting upon a certain theory as to his legal rights, or as to the legal effects of a given state of facts or transaction, brings his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case, the former judgment is no bar to the second action. It is true the subject-matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts. Further,

the evidence necessary to sustain the second action could not, if offered in the first, have altered the result."

Black on Judgments, Vol. 11, Sec. 733;
23 Cyc., pp. 1158 to 1161 (2nd Ed.).

"It is often loosely said, indeed, and sometimes held, that a judgment is conclusive of everything that might have been litigated in the action; but that is not generally held true, as will be seen, where the present suit is not upon or against the very same cause of action settled in the former, except so far as it relates to some issue actually joined and tried or to facts necessarily implied."

Bigelow on Estoppel, Sec. 111, p. 152 (5th Ed.);

Vide Greenleaf on Evidence, Vol. 1, Sec. 532 (16th Ed.).

This Court has repeatedly and distinctly affirmed this doctrine.

Davis vs. Brown, 94 U. S. 423 (1876);
Southern Pac. R. R. vs. U. S., 168 U. S. 1 (1897).

This Court has said in

Packet Co. vs. Sickles, 5 Wall, 580 (1866).

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, per se, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined,—that is, if the record of the former trial shows that the verdict could not have been rendered without

deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

So also this Court has held that where, in a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, the record cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts. And this rule is not varied because of the circumstance that, after the verdict was rendered, the court directed judgment to be entered for the plaintiffs on the first count in the declaration, being the special count.

Washington, etc., Steam Packet Co. vs.
Sickles, 24 How. 333 (1860);

This is the law also in Pennsylvania.

Martin vs. Pittsburgh Railroad Co., 227
Pa. 18, (1910);

Philadelphia vs. Ridge Ave. Ry. Co., 142
Pa. 484, (1891).

Commonwealth vs. Monongahela County,
216 Pa. 115 (1906);

Moser vs. Philada., etc., R. R. Co., 233 Pa.
259 (1911).

In the case of

Russell vs. Place, 94 U. S. 608 (1896),

this Court says:

It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a ques-

tion directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, *either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.* If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

In the present case we not only have no record before us to show what was involved and determined in the former action, but, if such record was here, it would unquestionably show a proceeding based, conducted and determined upon the common law and statute law of Pennsylvania. In the absence of that record, all this court can possibly do, if it feels so inclined, is to refer to 183 Federal Reporter 373, and there will be found reported a decision between parties different from the parties to this record and upon obviously a different cause of action, as the printed opinion of the Court of Appeals begins with these words: "This action was instituted . . . under the Pennsylvania statute, etc."

It is respectfully submitted therefore that the former action is not *res adjudicata* of the present one; and that the judgment of the Court of Appeals for the Third Circuit should be reversed, and judgment ordered to be re-entered in favor of plaintiff in error.

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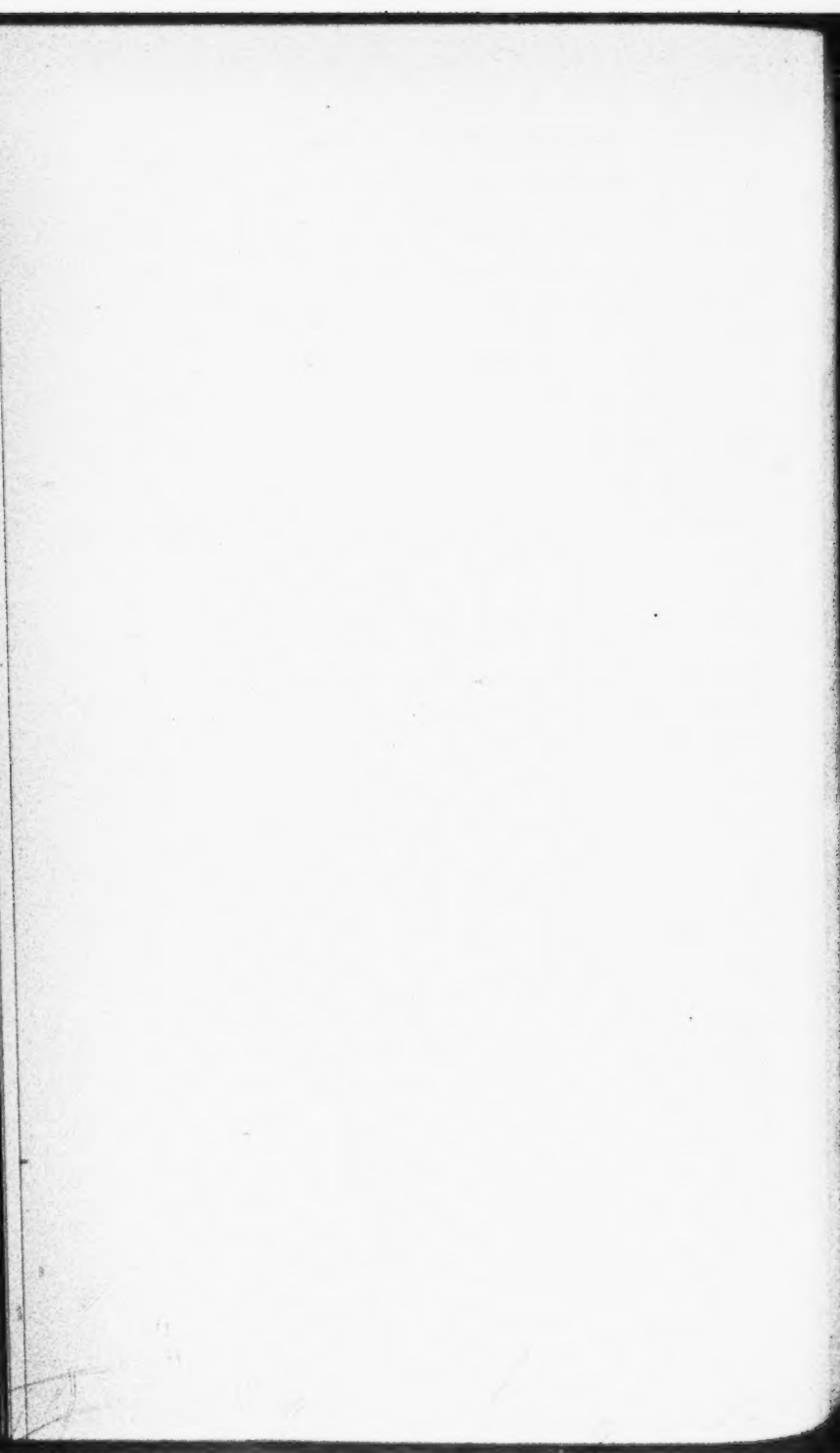
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IN THE
Supreme Court of the United States.

October Term, 1912. No. 854.

LIZZIE M. TROXELL, ADMINISTRATRIX OF THE ESTATE
OF JOSEPH DANIEL TROXELL, DECEASED,
Plaintiff in Error,
vs.

THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The present action was brought under the Federal Employer's Liability Act of 1908, by Lizzie M. Troxell, administratrix of the estate of Joseph D. Troxell, deceased, against The Delaware, Lackawanna and Western Railroad Company, to recover damages for herself as widow and for her children, on account of the alleged wrongful death of her husband, the decedent, an employee of defendant company, while engaged in both intrastate and interstate commerce.

The defendant company operates and controls the Bangor and Portland Railroad Company, whose tracks are entirely within the state of Pennsylvania.

Plaintiff's decedent Troxell was employed by the Bangor and Portland Railroad Company as a locomotive fireman from October, 1907, to the time of his death on July 21, 1909.

On July 19, 1909, Troxell, at the request of his engineer, placed six modern gondola ash cars, fully loaded, upon Albion Siding No. 2. This siding ran off the Pen Argyl branch, a short distance from where the latter joins the main line of this small railroad. Both Albion Siding No. 2 and the Pen Argyl branch are upon grades; the grade on the Pen Argyl branch being much heavier. The siding was not equipped with what is termed a derailing device, used to prevent cars improperly braked and blocked upon tracks having a grade from drifting to the main line.

On July 20, 1909, the Pen Argyl yard crew, in order to place two other cars at the rear of the siding, removed the ash cars, first having to release the brakes which were holding them, and placed them upon the heavier grade of the Pen Argyl branch, where the brakes also held them. The ash cars were then switched back upon the siding, and the four rear cars strongly braked and the first car doubled, that is two strong men applying the brake with their united strength; blocks were also placed under the right front wheels of the first two cars. The cars remained upon the siding until the following day, July 21, 1909, when for some unexplained reason, they got away and drifted out to the Pen Argyl branch, thence to the main line and then down the grade thereon where they collided with the locomotive upon which Troxell was firing, causing his death. At the time Troxell was killed, his locomotive was running from a place in the state of Pennsylvania to another place within the same state.

In the train his locomotive was hauling were cars being moved in both intrastate and interstate commerce.

There was no evidence that the brakes were not in good and efficient condition and the uncontradicted testimony upon both sides of the case was that with the brakes in good condition there was no way in which the cars could possibly move out unless someone released them. The learned trial judge left the question of the negligence of the Pen Argyl yard crew in the braking and blocking of the cars, to the jury when there was not even a scintilla of evidence of their negligence.

Prior to the institution of the present action under the Federal Employer's Liability Act, another action had been brought by Lizzie M. Troxell, under the Pennsylvania act which allows a recovery in damages for wrongful death for the benefit of the widow and children. That action was also brought in the United States Circuit Court for the Eastern District of Pennsylvania, and resulted in that court in a verdict for the plaintiff, which was afterwards reversed by the Circuit Court of Appeals for the Third Circuit, with a direction that the lower court enter judgment for the defendant non obstante veredicto. That action was brought for the benefit of the same parties, to recover for the same death against the same defendant and the statements of claim or declarations were almost identical.

After the reversal of the first action and the entering of judgment for the defendant non obstante veredicto, the same plaintiff brought the present action as administratrix, under the Federal Employer's Liability Act, against this same defendant for the benefit of the same parties.

To this action defendant pleaded "Not guilty" and "res judicata" (in that the prior action was a bar to the present action).

The plaintiff secured a rule to strike off the plea of *res judicata* and the Circuit Court discharged the same. She thereupon sued out a writ of error from the Circuit Court of Appeals for the Third Circuit, which the latter court dismissed as not being from a final judgment. With the pleadings in this state, i. e., without a reply to defendant's plea of *res judicata*, the lower court allowed, under objection and exception, the case to go to trial, resulting in a verdict for the plaintiff in upwards of ten thousand dollars. The defendant then sued out a writ of error from the Circuit Court of Appeals for the Third Circuit and that court held that the first action was *res judicata* of the second and directed the lower court to enter judgment for the defendant *non obstante veredicto*. From this judgment of the court of appeals in the premises the plaintiff sued out the present writ of error from this court.

ARGUMENT.

For the convenience of the court the argument will be divided as follows:

1. *There was no evidence from which the jury could find negligence.*
2. *The case was res judicata.*
3. *The case was not at issue.*

1. THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND NEGLIGENCE.

The trial judge allowed the case to go to the jury upon the theory that the jury might find that the Pen Argyl yard crew were guilty of negligence. It is submitted that in this he erred because binding instructions for the defendant should have been given, as

requested, for there was not a scintilla of evidence from which the jury could make a finding that defendant company, through its Pen Argyl yard crew, was guilty in any manner of negligence in the braking and blocking of the cars on Albion Siding No. 2.

Remembering the fact that there is not one iota of evidence tending to show that the brakes were other than in perfect order and condition and that:

(a) The six loaded ash cars had remained on the siding for upwards of twenty-four hours, until taken out by the Pen Argyl yard crew,

(b) That when taken out they were placed on the Pen Argyl branch which had a steeper grade, and stood there without moving, and

(c) That when placed back on the Albion siding, they were braked and blocked in such a manner that they could not possibly move out unless the brakes were released, and that they stood there for nearly twenty-four hours,

The conclusion is irresistible that the brakes were released by some unknown person.

As the burden of proof was upon the plaintiff, it was her duty to show that the cars moved by reason of something for which defendant was responsible. The law would not be satisfied for her to show that the cars might have moved for several reasons, for some of which the company might be responsible, and for others not.

The rule is thus stated in the United States Supreme Court.

Mr. Justice Brewer, in his opinion in the case of *Patton vs. T. & P. R. Co.*, 179 U. S. 658, said at page 663:

“The fact of an accident (to an employee) raises with it no presumption of negligence on the part of the employer; it is an affirmative fact for the injured employee to establish that the em-

ployer has been guilty of negligence. *T. & P. R. Co. vs. Barratt*, 166 U. S. 617. Second. That in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was, *and where the testimony leaves the matter uncertain and shows that anyone of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause*, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. . . ."

As the accident in this case occurred in Pennsylvania and the case was tried in the District Court for the Eastern District thereof, it may be well to cite a Pennsylvania case on the subject.

In *Marsh vs. Lehigh Valley Railroad Company*, 206 Pa. 558, Mr. Justice Brown, in his opinion, said at page 560:

"It is, of course, true that, as between employer and employee, the mere happening of an accident raises no presumption that it was due to the negligence of the employer, *and no theory as to how it might have happened unsupported by facts from which the jury can fairly find that the specific act of negligence charged is sustained, would justify the submission of the question to them.* While the employer owes his employee the duty of furnishing such machinery and appliances as, in the ordinary usage of the business engaged in, are safe and suitable, and of keeping them in such condition, *a verdict and judgment cannot be entered*

against him at the suit of an injured servant on a guess that he was negligent, or on a mere theory of specific negligence, without proof to sustain it. Specific negligence must be shown by competent testimony before the question of liability can go to the jury, but in no case or controversy are they to be guessers, but in all sworn tryers of facts, upon evidence submitted to them.

"This we have repeatedly said in cases like the present, among the latest being *Higgins vs. Fanning & Co.*, 195 Pa. 599; *Spees vs. Boggs*, 198 Pa. 112; *Alexander vs. Water Co.*, 201 Pa. 262; *Price vs. Lehigh Valley Railroad Co.*, 202 Pa. 176."

In *Labatt on Master and Servant*, Vol. 2, page 2315, the rule is thus stated:

"The doctrine stated in the last section involves the *corollary that a servant cannot recover where it is merely a matter of conjecture, surmise, speculation, or supposition, whether the injury was or was not due to the negligence of the master, or of an employee for whose acts and omissions he is responsible. From this rule it follows that the action cannot be maintained, if after all the testimony has been put in, it remains doubtful whether the injury resulted from the cause suggested by the master or from the cause suggested by the servant,*" citing:

Reilly vs. Campbell, 59 Fed. 990;

The Columbia, 106 Fed. 745 (E. D. Pa.).

Judge McPherson, of the Third Circuit, in his opinion in the latter case, said at page 746:

"There is no direct evidence how the bucket came to fall, and it is quite as easy to infer that it fell down the shaft before it was attached to the chain at all, or that the fall was caused by a negligent moving of the chain by the man on deck after the descent had begun, as it is to infer that the man on deck was careful throughout, and that the injury was due to the improper construction

of the shaft or the hook. *No evidence was offered concerning the conduct of the man who was at work upon the deck, and in this state of the proof, I am of the opinion that the libellant has failed to sustain the burden of proving the negligence of the ship by a preponderance of evidence.*"

The fact that there was no direct evidence in the former case, showing who caused the cars to move out by tampering with the brakes and blocks, was conceded by Judge Holland, in his opinion (180 Fed. 871), where he says at page 877:

"The defendant's evidence as to the braking and blocking of cars may be said to be conclusive that they could not have run away except as a result of some person loosening the brakes and removing the blocks, but there is nothing to show whether or not that was done by the railway employees, in the usual course of handling these cars, subsequent to their having been braked and blocked, or that it was outside parties, with the criminal purpose of permitting them to run out from the switch. There is no evidence on this point at all. Had the defendant been able to show that the cars started by reason of a criminal interference with the brakes and blocks by outside parties, it would have been in a more favorable position."

In *Norfolk & Western R. R. vs. Cromer's Administrator*, No. 101 Virginia, page 667, we have a case practically on all fours:

It was there held that:

"1. A railroad company is not liable for an injury inflicted on a fireman on one of its trains occasioned by impact with cars which drifted upon its main line just before the accident, either in consequence of some unknown person tampering with brakes that were in good order and sufficient to hold the cars, or of negligence on the part of a fellow-servant of such brakeman.

"2. Where reasonably adequate means have been provided to prevent cars on a siding from drifting on to the main track, it cannot be said that the removal of a derailing switch is negligence as a matter of law. Courts and juries cannot dictate to railway companies a choice between methods all of which are reasonably adequate for the purposes to be subserved.

"3. In order to hold a master liable for injuries sustained by a servant, while engaged in his employment, the burden is upon the servant to show affirmatively the negligence of the master, or a state of facts which warrants an inference of negligence, and that such negligence was the proximate cause of the injury. The evidence must show more than a mere probability of negligence." Judge Whittle, in his opinion, said (p. 669):

"It appears that on Monday, January 8, 1900, a west-bound passenger train, on which plaintiff's intestate, Cromer, was fireman, arrived at Pulaski behind time, and, while running at a high rate of speed collided with some freight cars, which had escaped from a siding, upon which they were stored, to the main track and Cromer was killed.

"The siding in question extends in a westerly direction from the place of accident, by the Pulaski Iron Furnace, to another point on the main line. It further appears that on Saturday, before the accident, twelve cars loaded with ore and coke for the furnace were stored on the siding, with brakes fastened and in safe condition.

"As was said by this court on the first appeal: "*The following occurrence is of interest as tending to show the sufficiency of the brakes to control those cars. On Saturday preceding the accident the employees of the company charged with that duty were putting cars in upon the siding, some of which were loaded with coke, when they came in contact with cars laden with ore standing towards the east end of the siding. The coke cars, which were being pushed, and the ore cars, which were at rest, did not couple, and*

the latter were put in motion by a jar. A brakeman sprang from the car upon which he was standing, overtook the ore cars, seven in number, which were moving off, applied brakes sufficient to stop them, and then at least two more brakes, out of abundant caution.

“‘It would seem that brakes which were sufficient to stop cars when in motion would be ample to hold them when at rest.’

“Just how these cars were set in motion on the evening of the accident is wholly a matter of conjecture.

“The plaintiff introduced the yard engineer, who stored the cars on the siding, and he propounds two theories on the subject—namely, that the brakes had been either tampered with, or that the cars were started by the impact of twenty-two or twenty-three loaded cars which were brought on the siding from the west by the employees of the company. In support of the latter theory, it appears that a few moments prior to the accident, after the yard engineer had left the siding, and while he was in the switch office, he heard these shifting cars come in contact with the stationary cars. The reasonable inference, therefore, would seem to be that the latter were set in motion as a result of that impact. And that inference is strengthened by the incident of Saturday, referred to in the opinion of the court.

“So far as the liability of the company is concerned, however, it is immaterial which theory is adopted. *If the brakes, which were shown by experience, as well as by direct evidence, to be amply sufficient to hold the cars in position, were tampered with, the company would, of course, not be responsible.*

“It likewise appears that six months prior to the accident there was a derailing switch on the siding near its eastern terminus, the presence of which, it is insisted, would have prevented the accident, and the removal of which constitutes negligence on the part of the company.

"The same contention was urged at the first trial and before this court on appeal. With respect to it, the court said:

"In view of the evidence in the case tending to show that the cars on the siding were provided with all the appliances necessary to keep them stationary, and that these appliances and all the rest of the machinery were in good order, it was error to instruct, or to assume in an instruction, that the duty of ordinary care, which the defendant owed to its servant, could only be met by a derailling switch to prevent the moving of cars from the siding to the main track.

"It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly discovered appliances. He is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

"These observations are as applicable to the evidence upon the second trial as they were to that on the first trial, and are conclusive in regard to the present contention.

"Courts and jurors cannot dictate to railway companies a choice between methods, all of which are shown to be reasonably adequate for the purposes intended to be subserved. Thus to subject them to the varying and uncertain opinions of juries in questions of policy, and to substitute the discretion of the latter for their discretion, would be wholly impracticable, and would prove alike disastrous to the companies and the public. *Tuttle vs. Ry. Co.*, 122 U. S. 189."

A somewhat similar case to the one at bar is that of *Grand Trunk, etc., R. Co. vs. Melrose*, 166 Ind. 658, where it was held that:

"An instruction that in an action for personal injuries caused by a box-car being moved by the wind from a switch provided with a derail-

ing device on to the main track, thereby causing a collision and plaintiff's injuries; that plaintiff should recover on proof that such derailing device, was defective or not in working order; that plaintiff was ignorant thereof and not contributorily negligent, is erroneous, *since it excluded consideration of defendant's reasonable care in providing other methods of securing such cars on side switch.*"

Judge Hadley, in his opinion, at page 667, said:

"The law did not require the company to put in the derails, but it did require it to employ such means at that and all other sidings, as would make the operation of the railroad reasonably safe against the escape of derailed cars from the siding to the main track. The means was a matter of choice within the limits of reasonable safety."

On page 669, the judge says, speaking of the instruction first quoted above, that:

"We do not see how the last instruction could be sustained. It implies the absolute duty of the railroad company to maintain the derail in working order. It impliedly denies the right of the company to employ any other kind of device, however efficient, and approved by railroad experts, to prevent cars from being blown out of the siding. It implies that the failure to keep the derail in working order was conclusive evidence of the company's negligence. It is entirely too narrow. In effect it takes the question of defendant's negligence from the jury."

"There was evidence tending to show that the box car, after being placed on the side track, was so locked and fastened by the brakes as to render it immovable by the wind, except by an unusual and extraordinary wind storm. Under this evidence, assuming that the derail was out of working order—the company was entitled, on the subject of its negligence, to submit to the jury the question, whether the manner in which the box car was

fastened and secured on the side track was such reasonable precaution against the car's being forced out of the siding by the wind, as would amount to ordinary care under all the facts and circumstances existing at that particular siding.

"The master owes to his servant ordinary care to provide a reasonably safe working place. But as a rule he is not required to adopt any particular mode of construction, kind of device, or appliance, to be in the exercise of ordinary care. *The test generally is, not whether this or that kind of means has been adopted, but whether, with the method of construction, or particular device or appliance employed, the place, under all the circumstances of the case, is reasonably safe for a performance of the duties of the employment.*

The burden being therefore upon the plaintiff to show negligence upon the part of defendant's yard crew in the manner of braking or blocking the cars or the insufficiency of the braking apparatus, all the evidence upon the subject upon the part of both plaintiff or defendant is referred to for the convenience of the court, and shows conclusively the impossibility of the cars getting away except by someone releasing the brakes; as to who did it, the evidence is silent.

PLAINTIFF'S EVIDENCE.

William H. Grupe (was trainman or brakeman upon the Pen Argyl yard crew and handled the cars on the twentieth of July, the day before the accident) testified (pp. 60-61) as follows:

"Q. Describe in your own way when you put these cars back what you did and your crew did in braking and blocking them, and why you had to do it, because you have testified in chief that it was necessary to do it.

A. As I stated before, we took them out on the Pen Argyl branch, and took them back in, and

I put on the four rear brakes, and the conductor and the head brakeman doubled on to another brake, and as I came walking up I saw the block under the head car on the right-hand side, on the engineer's side.

Q. How were the brakes—in good condition?

A. In working order; yes, sir.

Q. You put the brakes on the four rear cars?

A. Yes, sir.

Q. Did you put them on strongly or not?

A. As strong as I could pull them on with my hands.

Q. *After applying the brakes on these four rear cars would it hold the cars from going out on the siding?*

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. DEMMING:

Q. You say you braked the four rear cars?

A. Yes, sir.

Q. What do you mean by that?

A. Putting the brakes on them.

Q. Are you speaking now of the morning of the twentieth of July, about eight o'clock?

A. Yes, sir.

Q. You are the only man who had anything to do with the brakes on the four rear cars?

A. On the four rear cars; yes, sir.

Q. Who braked the two front cars?

A. I saw the conductor and the head brakeman brake one car.

Q. Which car was that?

A. The head car.

Q. You did not see them braking the other car?

A. No, sir.

Q. How did you know the cars were braked, the cars that you braked?

A. How did I know?

Q. Yes. How did you know it?

A. *I could tell by braking them whether they are braked good or not.*

Q. By braking them you can tell by turning the wheel?

A. Yes, sir; turning the wheel.

Q. And then when you went up to the front of the six cars you saw a block under the wheels, did you?

A. Yes, sir."

Page 62:

RE-CROSS-EXAMINATION.

"Q. You say you can tell very readily whether the brakes are in good condition when you put them on? Is that true?

A. Yes, sir.

Q. And these brakes were in good condition?

A. The brakes were all in working order, all four of them.

Q. YOU SAY THE BRAKES THAT YOU APPLIED ON THOSE FOUR REAR CARS WOULD HOLD THE WHOLE SIX RIGHT IN THERE, DO YOU?

A. THE FOUR BRAKES WOULD HOLD THE WHOLE SIX RIGHT IN THERE; YES, SIR."

DEFENDANT'S EVIDENCE.

Quintus Ruch (conductor of the Pen Argyl yard crew that handled the cars on July 20th, the day before the accident, about 8 A. M., on July 20, 1909. It was necessary to remove six ash cars in order to put two empty box cars in the rear of the siding for the convenience of a quarry). The witness testified on page 213 of record, as follows:

"Q. How did you find the brakes on those cars when you first found them on Albion No. 2?

A. We found the five brakes on.

Q. Did you release those brakes or did you not, in order to get the cars out?

A. We tried to pull them out and had to release them to get them out.

Q. You tried to get them out with what?

A. With the engine.

Q. You could not pull them out?

A. Could not pull them out, and had to release the brakes. The intention was to pull these cars out with the brakes on to help them after we got out of the switch.

Q. Then you got them out of this siding on to the Pen Argyl branch, and you say you did what then, in order to hold them?

A. We set three brakes on them.

Q. Set three brakes?

A. Yes, sir.

Q. Did that hold them?

A. That held them; yes, sir.

Q. What is the grade of the Pen Argyl branch where you placed these cars, compared with the grade of Albion No. 2?

A. The grade is heavier on the branch than it is on Albion No. 2.

Q. In putting these cars back, after you had placed the box cars in the quarry, describe then what you did.

A. We set them back and we put five brakes on and three blocks under."

Page 215:

"Q. Did you make any examination of the brakes on those cars?

A. No more than setting them and the fact three brakes held them on the Pen Argyl branch.

Q. Three brakes held all those cars?

A. Three brakes held them out on the Pen Argyl branch.

Q. Did you ever know of any other cars to be stored there?

A. Yes, sir.

Q. As many as six?

A. Yes, sir; as many as eighteen.

Q. Did you ever hear in all of your experience of any cars getting away from Albion No. 2?

A. No, sir."

Page 216:

"Q. How were these other cars held in there?

A. The eighteen by hand brakes.

Q. How many hand brakes to your own knowledge on those eighteen cars?

A. We used to put on four or five.

Q. Four or five would hold the eighteen cars?

A. Yes, sir; would hold eighteen."

Page 219:

"Q. How many brakes on these six cars did you put on?

A. I helped put on one."

Page 220:

"Q. How many blocks did you say you put under the car?

A. I put on two blocks.

Q. You are positive of that?

A. I am positive of that; yes, sir."

RE-DIRECT EXAMINATION.

Page 222:

"Q. Why did you not brake this second car? Was it or not because you considered that the five brakes would hold the cars?

By THE COURT:

Q. What was your reason?

A. FIVE BRAKES WERE SUFFICIENT TO HOLD SIX CARS IN THERE."

Page 223:

"Q. You say these cars afterwards got away, in answer to a question from my friend?

A. Yes, sir.

Q. Do you know how they got away; for what reason?

A. I do not know."

Pages 225-226:

"Q. IF THOSE CARS WERE IN THE SAME CONDITION AS TO BRAKES AND BLOCKS AT THE TIME THEY WENT OUT, I MEAN AS YOU HAD LEFT THEM, COULD THEY HAVE GONE OUT?

A. NO, SIR; THEY WOULD NOT. THEY WOULD NEVER HAVE GOTTEN AWAY.

Q. WHY COULD THEY NOT HAVE GONE OUT?

A. There were brakes and blocks sufficient to hold those cars.

Q. Did you ever hear of cars braked and blocked in the manner such as you braked those cars, going out from any siding of even a greater grade than Albion No. 2?

A. No, sir; they would not have gotten away.

Q. They could not have gotten away?

A. No, sir.

Q. Did you ever hear of cars drifting away from Albion No. 2?

A. No, sir.

Q. You say you have known of cars of a great number being stored there?

A. Yes, sir."

RE-CROSS-EXAMINATION.

"Q. You say if these cars were blocked and braked at the time they went away, as you left them, you do not see how they could get away?

A. THEY WOULD NOT GET AWAY WITH THE BRAKES AND BLOCKS UNDER.

Q. As you left them?

A. Yes, sir."

WILLIAM H. GRUPE.

Page 230:

"Q. Did you do anything toward braking the cars when you left them on Albion Siding No. 2?

A. I put on the four rear brakes.

Q. How did you put them on?

A. By hand.

Q. Strongly?

A. As tight as I could pull them.

Q. Can you or can you not tell whether brakes are in good condition, by the movement of the wheels and the looks?

A. Yes, sir.

Q. *How were these brakes?*

A. *In working order.*

Q. Did you see any other people braking any of these cars?

A. I saw the conductor and the head man on the head car."

Page 231:

"Q. *Was there anything further you or your crew could have done to have kept those cars in there?*

A. *No, sir.*"

CROSS-EXAMINATION.

Page 232:

"Q. You put the brakes, you say, on the four rear cars?

A. Yes, sir.

Q. *You put them on as hard as they would go. Is that the idea?*

A. *As hard as I could pull them.*

Q. Aside from that, pulling the brakes on, and the fact that they went on apparently, you do not know anything about the condition of those brakes?

A. I know they were in working order."

RE-DIRECT EXAMINATION.

Page 233:

"Q. You have seen as many as six cars loaded with material as heavy as ashes upon other sidings with a greater grade have you not?

A. Yes, sir.

Q. Did these cars get away, braked and blocked in the same manner?

A. No, sir.

William Sweeney (Assistant Superintendent of the Central Railroad Company of New Jersey, and who had been railroading for twenty-eight years, testifying in reference to some tests that were made the following February of six loaded ash cars on Albion Siding No. 2), said on pages 235-236:

"MR. CAMPBELL: I propose to prove by this witness, who is an expert, that on February 18, 1910, he, in company with some other people, went to Albion No. 2 switch, and that six loaded ash cars were put in different positions on the siding, and that different brakes were applied, and different blocks put in, and the cars did not move out, under different circumstances.

Q. Go on and describe what you did around Albion No. 2 siding on that day.

A. We knocked off the brakes, started to knock the brakes off of these cars.

Q.. They were all braked first?

A. At the rear end of the switch. We knocked them off toward the head end. We knocked all the brakes off of the cars to start, until we came to the last brake. We started with the one brake.

Q. They started with only one brake on?

A. Only one brake on.

Q. Did you make any tests with blocks?

A. Yes, sir.

Q. How many blocks were necessary to hold those six loaded ash cars in there?

A. We shoved the cars back in again and put one block on and they stood there.

Q. Without any brakes?

A. Without any brakes."

Page 238:

"Q. What, in your estimation, taking this Albion Siding No. 2, would be necessary for a down grade to keep those cars in there safely?

(Objected to.)

By MR. CAMPBELL:

Q. The ordinary safety, not to absolutely insure everything?

A. *Six loaded ash cars in that siding, three brakes would hold them there forever.*

Q. *Three brakes would hold them there forever?*

A. *Yes, sir.*

Q. *Would any blocks be necessary?*

A. *No, sir.*

Q. *No blocks at all necessary?*

A. *No, sir; no blocks necessary.*

CROSS-EXAMINATION.

Pages 243-244:

“Q. Should this Albion Siding No. 2 have been equipped with derailing devices?

A. Not necessarily.

Q. You do not think it was necessary?

A. For the protection of those cars. To hold those cars there it was not necessary.

Q. You finished your answer, did you not?

A. I say as far as the holding or the safety of those cars were concerned, with the brakes properly applied, there was no occasion for a derailing device.

Q. Therefore in saying there should have been no derailing device you are assuming that both things are true?

A. *I say it was not necessary to have a derailing device for the safety of those cars or for the holding of those cars. They would remain there forever with the brakes applied.”*

Page 244:

“Q. Never heard of cars running away?

A. *Never seen any cars running away—I have had some awful heavy grades—only where somebody tampered with them.*

Q. Have you not heard of them running away?

A. No, sir; I have not heard of any cars running away. I have never seen any on our road.”

Page 247:

"Q. Can you tell whether or not the pressure upon the rim of a wheel by the brake shoe is stronger after standing a long while, when the car is loaded?

A. IF THOSE CARS WOULD MOVE AT ALL, THEY WOULD HAVE MOVED THE MOMENT THE ENGINE GOT AWAY FROM THEM. IF THEY REMAINED THERE AFTER THE ENGINE GOT AWAY THERE WOULD BE NO CHANCE OF THEIR GETTING OUT THERE AFTERWARDS. THE GREATEST CHANCE WAS WHEN THE ENGINE WENT AWAY FROM THE CARS.

Q. *In your experience can a brakeman tell by putting the brake on whether it is good and efficient?*

A. Yes, sir; he can tell whether it is a good brake.

Q. You say you can tell, the trainman can tell whether a brake is in good condition, simply by putting on the brakes?

A. He has a very, very good idea."

Page 250:

"Q. *These cars had been standing upon that siding from July 19th until July 20th, held by five brakes only; they were taken out on July 20th, nearly twenty-four hours afterwards, and put on the Pen Argyl branch, which is a steeper grade, and three brakes held them. They were then placed back on the Albion Siding No. 2, which had a one per cent. grade, and the brakeman testified that they put on four brakes on the four rear cars and one double on the first car. Would you say that they would be able to tell then whether or not those brakes were in good condition, taking into account these previous tests?*

A. Yes, sir; the fact that they stood on that heavier grade proves that.

Q. *Notwithstanding the fact that they only stood a very short time?*

A. IT WOULD NOT MAKE ANY DIFFERENCE. THE VERY MOMENT THEY ARE PLACED AFTER THOSE BRAKES HOLD THEM, THAT TELLS THE TALE.

Q. Notwithstanding the fact in the second case they are blocked when put on the siding; that would not make any difference?

A. That is an extra precaution. Those three brakes held the cars on the heavier grade.

Q. You are asked about the testing of the brakes.

A. That is a clean, pure test. It could not be any better. The proof of the pudding is in eating it."

Frank B. Parry (trainmaster of the Lehigh Valley Railroad, who was present at Albion Siding No. 2 on February 18, 1910, when certain tests on six loaded ash cars were made), testified on pages 251-252 as follows:

"Q. Detail in your own way just what those tests were.

A. As I remember, when we went there we found six cars of ashes on that siding. The brakeman started to leave the brakes off from the rear end; that is, the first car on the siding. When he got the five brakes off, the cars started out. The cars were pushed back on the siding again and a block put ahead of the wheel to hold the cars.

Q. One block held the cars without any brakes?

A. Yes, sir.

Q. Can a brakeman handling a hand brake, pulling it up, tell whether or not the brake is in good condition and that the shoe comes in contact with the rim?

A. Yes, as a general rule.

Q. Suppose these six loaded ash cars were on Albion Siding No. 2 for upwards of twenty-four hours, with five brakes upon them and no blocks, and the cars after twenty-four hours were taken out and put on the Pen Argyl branch where the grade is steeper, and the whole train is held by three brakes, and they stay there during the time

necessary to put in two box cars at the rear of the siding, and they are then placed back on Albion Siding No. 2, could you tell whether or not then the man braking the cars could discover defects when he was putting on the brakes?

A. Could he discover?

Q. Yes.

A. Yes, if he was an experienced brakeman he should be able to discover if there is any defect in those brakes.

Q. These cars had had those tests?

A. Yes, sir.

Q. Would these tests show any such defects as you made a condition in your previous answer?

A. I think they would.

Q. *Did you ever hear of cars drifting away from a siding such as Albion Siding No. 2, or one similar thereto, braked and blocked in the manner in which it has been described these cars were?*

A. *I have never.*

Q. *In all your experience?*

A. *No."*

CROSS-EXAMINATION.

Page 255:

"Q. You were asked the question, supposing these cars had been standing on Albion Siding No. 2, and were moved out and then stood on the Pen Argyl branch, and then moved back and allowed to stand there again, whether or not that was a proper test of the brakes. I believe you said that that would be. Did you or did you not say that that would be a test?

A. That would be a test; yes, sir.

Q. Would it be a positive test?

A. Yes, sir."

Page 256:

"Q. You say that if any experienced brakeman put on a brake you think he could tell whether or not that brake was in good condition.

A. Yes, sir.

Q. Is that a positive test of the brake?

A. As positive as you could make; yes.

Q. As positive as you could make it, but it is not an absolutely positive test, is it?

A. I would consider it so."

Page 261:

"Q. You say that two brakes—it required two brakes to hold the cars?

A. Yes, sir.

Q. Did you regard those cars then as perfectly safe so far as the main line was concerned?

A. With the two brakes on?

Q. Yes.

A. I would consider three brakes would be sufficient to hold the cars.

Q. You would regard that, then, as a perfectly safe condition on the main line, would you?

A. Yes, sir."

P. J. Langan (General Air Brake Inspector for the whole Lackawanna Railroad System since August, 1910, having full charge of brake appliances on cars and locomotives and engaged in railroad work since 1885) testified as follows (p. 267):

"Q. Could a brakeman operating a hand brake tell by the motion, and from what he could see while he was operating the brake, whether or not they were in good condition?

A. That is the best efficiency test known.

Q. You have been here during all this trial?

A. Yes.

Q. You have heard that six loaded ash cars were placed on Albion Siding No. 2 and stood there for upwards of twenty-four hours with five brakes on and no blocks; that, in order to take those cars out of there, it was necessary to release the brakes, because the locomotive could not pull them out; they were then taken and put on Pen Argyl branch, which has a greater grade, and

three brakes held them. They were afterwards then put back on Albion No. 2 again, and the only testimony in the case is that the four rear cars were braked, the front car was double braked, and some blocks were put under it. Now can you tell us whether the two brakemen operating those brakes—or three, I believe—could tell from the motion of the staff, and the feel, whether or not those brakes were in good condition?

A. I would say yes.

Q. *Take six gondola cars of 60,000 pounds capacity on a one per cent. grade; how many brakes in good condition would you say would hold those cars?*

A. *With the cars standing?*

Q. *With the cars standing.*

A. One good brake will hold six cars on a one per cent. grade, if properly applied, if the brake is in good condition.

Q. What do you call good condition?

A. What we call good condition is the average condition, where there is nothing to prevent the brake shoe from being drawn properly against the wheels, and where the percentage of brake power is correct."

RE-DIRECT EXAMINATION.

Pages 286-287:

"By MR. CAMPBELL:

Q. *Now coming down to facts and common sense, assuming the story of Mr. Grupe and Mr. Ruch, the brakemen upon these six loaded ash cars, to be true, would you say that those cars could get out of the siding by reason of anything that you know of?*

MR. DEMMING: Does your Honor think we should go into this all again? Mr. Campbell had his opportunity to examine the witness in the first place.

THE COURT: Answer the question.

A. *I would say that the cars could not get out of the siding unless the brakes were released.*

H. E. Griffith (trainmaster of the Bangor and Portland Division of the Delaware, Lackawanna and Western Railroad Company, who was present on February 18, 1910, when certain tests were made) testified as follows (p. 288):

"Q. Go on and describe what tests you saw.

A. We placed six cars of ashes in the siding, with all the brakes on, released all the brakes, had a block under the front wheel and it held the cars. The block held the cars, one block."

CROSS-EXAMINATION.

Page 291:

"Q. And you found then that how many brakes would hold them?

A. One brake."

RE-DIRECT EXAMINATION.

Page 291:

"Q. How many brakes would you think it would be safe to put on there to hold those cars?

A. Three.

Q. That would be perfectly safe?

A. It would, yes, sir.

Q. Did you ever hear of any cars getting out of any siding around on the B. & P. Division on a one per cent. grade, or any other per cent. grade where three cars were braked?

A. No, sir."

Palmer Moses (the engineer of the switching crew who put the ash cars on the siding on July 20, 1909) testified as follows (pp. 292-293):

"Q. When you first went there to get the cars out of Albion No. 2, how were they braked in there? Were the cars braked in there?

A. Yes, sir.

Q. How do you know?

A. I started to pull them out and could not.

Q. You started to pull them out and could not?

A. I had a signal to start and pull them out and could not pull them.

Q. What held them?

A. The brakes.

Q. What brakes?

A. Hand brakes.

Q. Did you put any air in those brakes while you were handling them?

A. No, sir."

From the foregoing excerpts taken from the evidence given at the trial (excluding the testimony of plaintiff's witnesses Riegel and Marsena Parsons, which are hereafter discussed, it is obvious that the testimony of the witnesses produced by both plaintiff and defendant as to certain facts, makes it evident beyond the shadow of a doubt that these six loaded ash cars when they were placed on this siding were braked and blocked, so that it was impossible for them to escape, provided no one meddled with the brakes or blocks.

Indeed, in his charge to the jury the trial judge used the following language (Record, p. 299):

"It appears from both sides that these cars were braked and blocked. That is conceded and undisputed, but the plaintiff and the defendant at this point differ as to whether they were braked and blocked carefully."

(Apparently the trial judge believed that the testimony *on both sides* showed that the cars were braked and blocked. He permitted the jury, however, to find from the foregoing evidence and from Riegel's testimony, that the braking and blocking was done in a negligent manner.) (Record, pp. 299-300.)

"But the plaintiff says that they have established by circumstantial evidence, that these cars

were negligently braked and blocked, and that they ran away, not because of any tampering with them by trespassers, but because they were negligently braked and blocked."

In the first place, defendant contends that the trial judge assumed something which was not a fact, to wit, that the defendant offered as a defence the theory that some trespasser must have tampered with the brakes and blocks, so that they became released, and that defendant is therefore not responsible since this was the act of a trespasser. This was not defendant's theory of the case. The law is that the mere happening of an accident is not proof of an employer's negligence when an employee is injured. The employee must show some concrete negligence on the part of his employer (or his fellow servant) before he can recover. The thought that some trespasser must have tampered with the brakes and blocks was not injected into the case by the defendant as a defense, because it is plain from the foregoing testimony that defendant did not need to offer any defense for the reason that the plaintiff had not sufficiently made out her case. Plaintiff must prove negligence and the trial judge alleges that there was "circumstantial evidence of negligence." Defendant in the course of the case merely brought up the thought of some trespasser tampering with the brakes and blocks, to show that that inference was quite as probable, if indeed not more probable, than any inference that could be drawn from the evidence, tending to show that defendant was negligent. As has been said in one of the cases cited *ante*, if the plaintiff employee shows that an accident happened, which may or may not have been due to some negligence on the part of the defendant, his employer, then he has not made out his case, because non constat, but that his employer was not negligent and therefore is not liable. In other

words, the employee has not successfully met his burden of proof, which is so in the case at bar.

Recurring for an instant to the foregoing testimony, which the trial judge said might be circumstantial evidence of negligence on defendant's part, it is plain that in this he was in error. The fact is uncontradicted, and is testified to on both sides, that the cars were braked and blocked with sufficient care on the siding, so that they could not possibly have escaped. All the evidence in the case shows this to be an absolute fact. There was not a scintilla of evidence produced by the plaintiff from which the jury could infer, even circumstantially, that there was any negligence in the manner in which the six cars were left on Albion Siding No. 2. If the trial judge believed, as the evidence of both sides showed, that the cars were braked and blocked, how could he say that there was any evidence but that this was done with every degree of care? He admits that the evidence shows that they were braked and blocked, and the same identical evidence on both sides shows that they were properly and sufficiently braked and blocked. Therefore, if he believes the evidence at all, he must believe it to this extent.

The trial judge further says in his charge (Record, p. 302), "if the plaintiff has failed to establish that they were negligently blocked and braked, then the plaintiff has no case. *If it is unexplained how it came that they got away, there is no liability on the part of the defendant.*"

Defendant's contention is simply this, that the plaintiff had failed to establish that the cars were negligently braked and blocked, because the evidence on both sides is absolute and uncontradicted that the cars were properly braked and blocked, and that it was not explained how they got away. Therefore, there could be no liability on the part of defendant.

With the exception of the evidence of plaintiff's witness, Riegel, which will presently be discussed, the evidence in the case at bar is practically identical with the evidence given at the former trial, on the decision of which the Court of Appeals used the following language (183 F. 375):

"The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant, however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was 'doubled,' that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking, of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might 'be said to be conclusive that they (the cars) could not have run away except as the result of some person loosening the brakes and removing the blocks,' and as to how or by whom the brakes were loosened and the blocks removed, he

admitted that there was no evidence. It appears that the case was allowed to go to the jury practically upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably, but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. *Any theory, however, which might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter."*

The foregoing language is applicable, word for word, to the facts here. Any theory, which would endeavor to explain the escape of these cars, from the evidence produced at the trial of this case, would be nothing more or less than conjecture and, therefore, inadmissible.

EVIDENCE OF JOHN I. RIEGEL.

We will now consider the admissibility and applicability of the testimony of this witness—the plaintiff's expert.

John I. Riegel testified in substance as follows (Record, pp. 129-202, and 293 to 295):

That he was a civil engineer, having graduated from Lehigh University in 1892, and that he had had considerable experience in the construction and drafting departments of various railroads, but none in the operating department of railroads. That he had never seen the six ash cars which ran away and knew nothing about the kind of brakes on them, or the condition the brakes were in. That he had seen Albion Siding No.

2 and that the first hundred feet from the frog was practically level, and that the next two hundred feet had approximately a one per cent. grade. That the conditions entering into the holding power of brakes and their involuntary release were various, among others he mentioned the manner of placing the cars, the action of the brakes between the brake bands and wheels, the grade, the condition of the track, the temperature, the amount of water present, the wind velocity, the condition of repair of the brakes, the force applied in putting them on. That he did not know of his own knowledge anything whatever about a single one of the foregoing elements as they existed at the time the six ash cars were put upon Albion Siding No. 2, except the grade of the siding, and that cars of a similar capacity should have brakes and brake apparatus on them equivalent to a certain standard, which standard he was familiar with. That he knew nothing whatever about the six cars in question, or the condition of the brakes on them, or the circumstances and surrounding elements at the time they were braked and blocked on the siding, of his own knowledge, but had heard the testimony of the foregoing witnesses.

That there were various methods or things which might cause the brakes on the ash cars in question to work loose, among them there was mentioned the following: There *might* be too much slack in the chain, so that it *might* bind around the brake staff. There *might* be a false motion in some of the rods. There *might* be some material lodged between the brake shoe and the car wheel, which *might* become crushed after a time, releasing the brake. The air *might* not have been "bled" out from the cylinder entirely and the air left *might* cause the chain to drop due to its pressure on the brake piston. The chain *might* lap falsely over one link or another, and in standing some slight

change in temperature *might* cause it to sag or drop and release the brake. The chain *might* be too long or the links too large in diameter. The car *might* be placed so that the journals were not absolutely in their center bearings, and then when the brakes were applied, though at first they would hold, yet when the journals came to a final settlement the brakes *might* thereby be released. There *might* be a speck of rust in one of the fulcrums, which *might* yield and release the car to a considerable extent. These were among the *possibilities* mentioned by the witness and he also stated that there were others which he did not enumerate.

At other places in his testimony he was forced to admit that he had never heard of an instance where six loaded ash cars, braked as the six ash cars in question were braked and with the brakes in good condition, had afterwards run away from a siding similar to Albion Siding No. 2; that it was not probable that they could get away under such circumstances, and *finally he stated that with brakes in perfect condition and properly set on four of the six cars in question, the brakes would never release themselves so as to permit the cars to escape any further. That if the brakes were in good condition and properly braked, the probabilities before enumerated by him would be too remote to account for the escape of the cars.*

His testimony was further concerned with the effect of the previous derailment on July 9, 1909, of three of the six ash cars upon the brakes of these three cars. In this regard his testimony was to the effect that there would be some probability of the brakes on these three cars being affected by such shock (caused by the application of the brakes due to the separation of the train at the time of the derailment). That if, at the time of the derailment, the three cars in question, next the locomotive, had stopped them-

selves, and the locomotive almost immediately (and the testimony was exactly that), it was a very good test of the efficient condition of the brakes at the time.

He further testified that the fact that the locomotive of the switching crew which attempted to remove the six ash cars (when they wanted to place two box cars behind them on July 20, 1909) could not pull the six cars out until the hand brakes had been released, was a very good test of their efficiency (and it must be remembered that this efficient test occurred *after* the derailment of July 19, 1909, which he had testified probably *might* have had some harmful effect upon the brakes).

The witness further testified that there was no assurance that the brake shoe was applied to the wheel when the brakeman put the brake on "hard" by turning the brake wheel with force, because of the various possibilities that he before alluded to, i. e., some lapping of the brake chain, some defect in the brake, some foreign substance being between the shoe and the wheel, which would hold at first, but later become crushed. But what with the brake apparatus in good condition, and the conditions absent which might affect it adversely, it was certain that the turning of the brake wheel would apply the brake shoes against the wheels of the truck. [Some of his testimony, as to the possibility of a change of four degrees in the temperature, affecting the elasticity of a brake chain and causing the brake to be released, and as to the possibility of water being drawn in by capillary attraction within the time of four hours between the brake shoe (after it is applied by hard pressure by hand on the brake wheel) and the surface of the wheel, and thus causing the brake to slide and permit the car to move is exceedingly important from the viewpoint of theoretical education, and is ridiculous in fact. This evi-

dence needs no further comment than a mere statement of it.]

Counsel for plaintiff also took up the question of the deduction that could be made from the evidence of Marsena Parsons in reference to the block being cut. He stated to Riegel that "one witness testified that the day before (i. e., the day of the twentieth of July, 1909) the block was not cut, and that the next morning, about a quarter of seven or thereabouts, that block, a 3 x 6, was cut about three-quarters through," and asked him whether that would indicate that the brakes were on or off. This was a clear misstatement of the testimony of Marsena Parsons, whose evidence was that the impression on the block *seemed to be deeper* on the morning of July 21, 1909, than it was on July 20, 1909, and who never intimated that there was no impression at all in the block on July 20th. To this question based upon a misstatement of the evidence Riegel answered that it would indicate that the brakes on the cars were off, but that this was mere opinion with nothing to base it upon other than the resistance of the timber.

(Moreover, it is perfectly obvious that even admitting that his deduction is correct, nevertheless it brings us no nearer the solution of the case, for the reason that it is plain that the brakes must have been off in order to allow the cars to escape. The solution of the case depends upon *discovering what caused the brakes to become loose*, and neither the evidence of Marsena Parsons, nor the deduction that Riegel drew, helps one whit in the solution of this problem. Of course, the brakes were off at the time the cars escaped, but what caused them to become loosened, and when that question is answered it must further be determined whether or not the defendant is responsible for the cause so ascertained. In the solution of these two questions

we are not helped by the testimony of either Marsena Parsons nor John I. Riegel.)

He further testified that the blasting in the slate quarries adjacent to Albion Siding No. 2 could have only a comparatively light effect on the cars and that he never heard of cars running away because of blasts from slate quarries and never knew of any provisions to prevent such an occurrence having been taken by railroads. He had heard of one instance where a small mine car in a coal mine, braked and left near an explosion, had been affected by such explosion, but knew nothing about the surrounding circumstances of that case, and admitted that an explosion in a mine, which would be a confined explosion, would be more likely to affect a car than an explosion in an open slate quarry.

Finally the witness admitted that Langan, the expert whom the defendant would (and did) call, who was general brake inspector of the Delaware, Lackawanna and Western Railroad, knew "far more" about brakes than he himself did.

We will now consider Riegel's testimony under the two following heads:

(a) Was his testimony admissible?

(b) Even if admissible and relevant, did it tend to show in any manner that this defendant was negligent?

(a) WAS HIS TESTIMONY ADMISSIBLE?

It is defendant's contention that the testimony of plaintiff's expert, John I. Riegel, was inadmissible and irrelevant, and should have been stricken from the record, for the reason that the theories which he propounded in his attempts to explain the escape of the six ash cars from Albion Siding No. 2 were not based upon any facts shown to exist by the evidence, and

were nothing but the merest guesses as to what *might* have caused the accident.

As is perfectly apparent, the object of this testimony was to counteract the effect of the positive and uncontradicted testimony of all the witnesses who gave testimony as to the facts. Riegel was an expert engineer who had seen nothing of the actual event, nor of the cars in question, and it was his purpose to explain away, if possible, the positive and uncontradicted evidence of all the eye witnesses. Taking up his testimony, let us see how he tried to overcome the force of the positive evidence and explain the escape of the cars, and let us consider on what conditions and suppositions he bases his theories:

He said that there *might* be too much slack in the chain, so that it *might* bind on the staff. Of course, this possibility might have occurred, at least, in his opinion, but there is not the slightest evidence in all the testimony to show that the brake chain was too slack. It had held before for some time, had resisted the force of an engine to pull the cars out, had held the cars on a heavier grade while box cars were put behind them and held the cars for nearly twenty-four hours before they finally escaped. His opinion is an attempt to explain this escape, which is not founded upon a scintilla of evidence. The law is clear that the burden is on the plaintiff to prove negligence. The evidence on both sides clearly shows that the brakes were in good condition, had had two "natural" tests of their efficiency before the escape, and were properly applied by competent brakemen. Where then is there any *fact* in evidence upon which this opinion that the chain bound might be based? It is merely a theoretical attempt to explain the escape of the cars, which is utterly unsupported by one word in the evidence.

The same can be said of every other possible explanation given, as: a false motion in some of the rods,

or some material becoming lodged between the brake shoe and the car wheel, or some air remaining in the air cylinders and by some peculiar, mysterious dispensation acting so as to release the brakes, or the chain lapping falsely, or the change in temperature causing the chain to sag, or the journals being not absolutely on their center bearings, or a speck of rust in one of the fulcrums yielding. These were his various explanations of possible causes. They were not at all evidence of what did happen, nor were they based in any way upon the evidence which was frequently directly to the contrary; they were nothing more nor less than theoretical explanations of what might have been the reason for the cars running away. He made absolutely no attempt to give as a basis for them any fact already in evidence and in some instances the evidence of the facts directly contradicted his theory, as for instance the most plausible explanation that of the air remaining in the cylinders and in some way (not clearly explained) afterwards releasing the brakes. The evidence of Palmer Moser, the switching engineer, was clear that after the cars had been on this siding about twelve hours held by hand brakes, he moved them out and replaced them. He testified:

“Q. Did you put any air in those brakes while you were handling them?

A. No, sir.”

and he was not cross-examined.

It is admitted that if this witness had been asked the question, not in the trial of a case at all, “What are the various theories by which you can attempt to explain the fact that six ash cars on a siding with a one per cent. grade having been braked and blocked properly and with the braking apparatus in good order, escaped from that siding?” his answers, reasons and explanations would have been almost identical to

the evidence he gave at the trial, for of his own knowledge he knew nothing of the cars, of the brakes on them, of the condition of the brakes, nor of the way in which they were braked and blocked. He did not attempt to make a basis for his theories from the evidence of the facts, as given by both sides, but he simply gave the various theoretical possibilities which (aside from the sane explanation that some one must have released the brakes by tampering with them) in his opinion might be an explanation. Clearly this evidence was not admissible and should have been excluded, for evidence of what possibly might be an explanation which is not based upon the facts in evidence is not relevant.

Cyc. Vol. 17, at page 212, states this law as follows:

"A mere supposition as to what would have happened, if something had occurred which did not, or something had not occurred which did . . . will be rejected as involving too large an element of conjecture, even where the fact would be relevant and not within the province of the jury."

Applying this to the case at bar, Riegel, for example, says, that some substances might have been between the brake shoes and the wheels, which might have held at first and been crushed later, thus releasing the brakes. There is nothing in the evidence that any such thing (which would be *rara avis* to say the least) occurred, and it cannot be assumed to have occurred. Therefore his explanation as to what might have happened had this foreign substance been present, when as a fact it was not, is totally irrelevant. As also is his theory that the air which might not have been "bled" entirely out of the cylinder might have worked afterwards and released the brakes, because the evidence was clear that no air was used.

Again he said that the chain might have been too slack and this might have caused it to bind. There is absolutely no evidence that the chain was too slack, and he cannot assume that it was since he knew absolutely nothing about the cars in question. If such an element was present and if the plaintiff relied or intended to rely upon it to show negligence, it was upon the plaintiff to produce evidence of it, and counsel could have asked the question of any of his own or of defendant's witnesses. Since it was not proven, the plaintiff cannot assume that it existed, and then base his expert's theory upon its assumed existence. To give a final illustration, Riegel testified that there *might* be a speck of rust on one of the fulcrums, which *might* yield and cause the brakes to release. If this speck of rust was an essential element in plaintiff's case, she should have proved its existence, and then it would have been proper to have asked this expert to say what results might have followed. The existence of even a speck of rust cannot be assumed, when such dire consequences are claimed as a result.

The law is clear that Riegel's testimony was irrelevant and incompetent, being based on suppositions contrary to or not shown by the evidence, and it should have been excluded.

"It is reversible error to admit the answers of expert witnesses to hypothetical questions which assume the existence of facts of which no evidence is offered."

North American Accident Ass'n vs. Woodson, 64 F., 689 (C. C. A., Ills.).

"On an issue as to defendant's negligence in failing to properly timber a mine, by reason of which, as alleged, there was a cave, and plaintiff's intestate was killed, where defendant had shown by an expert witness that a cave might occur in a mine properly timbered, it was not error to ex-

clude testimony as to particular causes which might produce it, when there was no evidence that any such cause existed at the mine in question."

Mountain Copper Co. vs. VanBuren, 133 F.,
I (C. C. A., Cal.).

Judge Hawley, in the above case, saying in his opinion, at page 12:

"We think the ruling of the court was correct (excluding expert testimony). The witness had already testified to the fact which counsel wished to impress upon the jury—that caves might occur in properly-timbered mines—and it was then sought to obtain the witness' idea as to what might cause such caves, without reference to any conditions existing at the mine in question. It may be that a hidden cavern filled with flowing water might seep through the upper levels and cause a cave, which human foresight could not guard against. But there is no pretense that anything of that kind existed at the time of the cave in question. It may be that a volcanic eruption might cause a cave in a mine that was properly timbered, but nothing of that kind is shown to have occurred. The same as to an earthquake and numerous other imaginary things. The court was right in restricting the testimony to conditions existing at the time, and refusing to enter into the wide field of speculation and conjecture as to what might cause a cave in a well-timbered mine."

In Hitchner Wall Paper Co. vs. P. R. R., 158
F., 1011 (C. C. A., Pa.), it was held
that:

"In an action against a railroad company for the destruction of plaintiff's mill by fire from sparks, a question 'how far would a spark on a windy day, going through the mesh of the size used by the railroad company, carry and be capable of setting fire to paper or other objects of that character' was objectionable for failure to embody the conditions existing at the time of the fire."

That the foregoing statement of the law is similar to the law in the state of Pennsylvania is shown by the case of *Lincoski vs. Coal Co.*, 157 Pa. 153 (where an expert who had never examined the mine in which the cave-in occurred was held an incompetent witness to answer a question based upon conditions not shown by the evidence to have existed as a fact, at the time the cave-in took place); and by the case of *Palmer's Estate*, 5 W. N. C. 542 (where it was held that two doctors in order to testify to the testamentary capacity of decedent should state the circumstances and symptoms from which they drew their conclusions), and by the case of *First Bank of Easton vs. Wirebach*, 106 Pa. 37.

In *Porter vs. Buckley*, 147 F. 140 (C. C. A., 3rd Circ., 1906), it was held that:

"Testimony as to the comparative amount of noise made by different makes of automobiles, based on comparisons made by the witness, was properly excluded where there was no proof of the condition of the machines with which the test was made."

Judge Lanning, in his opinion at page 142, saying:

"The third and fourth assignments relate to the exclusion of the proffered testimony of Thomas H. Throp as to the comparative noises made by a Winton car of the type used by the defendant at the time of the accident, and other machines, and to striking out the testimony given by him to the effect that he had made such comparisons. The testimony offered was properly excluded. While Mr. Throp testified that he had made such comparisons, there was no proof of the condition of the machines with which the comparisons were made. In view of these facts, his testimony that he had compared the noise made by a Winton car with the noises made by other machines was immaterial, and was properly stricken out."

This entire subject is the basis of a "Note" in 42 L. R. A. 753, which goes into the subject most carefully and shows conclusively (p. 762) that the opinion of an expert cannot be allowed to outweigh the positive corroborated and uncontradicted testimony of unimpeached witnesses to a fact, and many cases are therein cited to sustain this proposition. This note further shows (p. 761) that the opinion of an expert is of no value when the facts on which it is predicated are not established.

It is submitted that when the testimony of Riegel is considered in the light of the foregoing decisions, it is entirely irrelevant and should not have been admitted. The court on this appeal can, therefore, consider the matter just as though his evidence had not been given, as it is obvious that the plaintiff herself would hardly contend that without his testimony there was anything in her evidence to take the case to the jury.

(b) EVEN IF ADMISSIBLE, THE TESTIMONY OF RIEGEL DID NOT TEND TO SHOW THAT THE DEFENDANT WAS NEGLIGENT.

Finally, it is clear from Riegel's own evidence that there was no negligence proven in the manner of leaving the six cars by the yard crew.

He himself testified that, if the brakes were in perfect condition and if the brakes and blocks were set as the evidence shows they were set, the cars could not have escaped until the brakes were released, and he did not know how the brakes could have released themselves if they were in perfect condition. And yet that is practically the evidence of what actually existed. All the yard crew and the crew of Troxell's locomotive testified and were in no way contradicted that the brakes were in good condition and were set carefully.

Thereupon the witness, Riegel, goes into a number of conditions which might have caused the brakes to release. Admitting, for the sake of the argument, that his testimony was admissible, still it does not show the least particle of negligence on the part of this yard crew.

Consider the theories he gives:

- (a) Too much slack in the brake chain.
- (b) False motion in some of the rods.
- (c) Some material lodged between the shoe and the wheel which might become crushed.
- (d) All the air not bled out of the air cylinder.
- (e) A change in temperature.
- (f) The journals not being absolutely on the center of their bearings and later changing their position.
- (g) The lapping of the links of the brake chain.
- (h) The existence of a speck of rust in one of the fulcrums which might become crushed.

The foregoing are the elements mentioned by Riegel as possibly accounting for the escape of the cars. Supposing them to be sensible, and taking it for granted that they are admissible in evidence, though unsupported by one word of testimony as to their existence, wherein do they show any negligence on the part of the yard crew in the manner of braking and blocking the six cars, which is the theory relied upon by the plaintiff, and adopted in his charge by the trial judge. Nearly all of them are defects which could be chargeable to improper inspection of the brakes, but that is not the negligence relied upon in the statement of claim, nor at the trial. Not one of them can be laid at the door of this yard crew as a negligent act for which they should be held responsible.

Suppose for the sake of the argument that there was too much slack in the brake chain and that this defect caused the accident, and suppose also that this was properly proved at the trial. Nevertheless the plaintiff must still show that the defendant in the case at bar knew, or should have known, of this defect. It would not be enough for the plaintiff to prove that the defect existed and that it caused the accident unless she proved that the defendant knew, or should have known, of the existence of such a defect. That this is the law is plain from the following citations:

26 Cyc. page 1142, lays down the law in this matter as follows:

“The master’s liability for injuries to a servant arising from defects in the place for work, or in the machinery or appliances, is dependent upon his knowledge, actual or constructive, of such defects. If he knew, or should have known, by the exercise of reasonable care and diligence, of their existence, he is liable; negligent ignorance is equivalent to knowledge, but if he had no knowledge thereof, and his ignorance was not the result of want of due care, he is not liable.”

Davidson vs. Southern Pacific Co., 44 Fed. 476, at page 481:

“And to authorize a verdict against the defendant for an unsafe track, etc., you must believe from the testimony that the defendant knew, or should have known, by the use of reasonable care and prudence, of its unsafe condition.”

Erskine vs. Chino Co., 71 Fed. 270, holds:

“That an employer is not liable for injuries to an employee resulting from the defective appliances, unless he had actual knowledge of the defect, or by ordinary care could have obtained such knowledge in time to prevent the injury.”

To the same effect are the following cases:

- Palmer vs. Denver Co., 12 Fed. 392;
- Texas Co. vs. Barrett, 166 U. S. 617;
- Great Northern Co. vs. McLaughlin, 70 Fed. 669;
- Texas Co. vs. Elliott, 71 Fed. 378;
- Hudson vs. Charleston Co., 55 Fed. 248;
- Johnson vs. Armour, 18 Fed. 490;
- Bean vs. Oceanic, 24 Fed. 124.

It cannot fail to be apparent from a most cursory examination of the testimony and the charge that the plaintiff did not rely upon the theory that there was a defect in the appliances, of which the defendant had, or should have had, knowledge. The theory the plaintiff relied upon was that the cars were improperly braked and blocked by defendant's employees and not that there was anything wrong with the appliances. But when Riegel's testimony is considered it is at once obvious that the theories he propounded are based upon certain propositions (none of which are supported by any evidence) which would go to show that the appliances and brakes were not in a good condition. *Not one of them show negligence in the manner of applying the brakes.* But taking this to be so, how does this show any knowledge, or any opportunity for knowledge, on the part of the defendant?

On the other hand, the positive evidence shows that all the brakes on three cars were in good condition, as, when a derailment occurred two days before the day of the accident, the brakes on three of the six cars which afterwards ran away, stopped the train. (Record, p. 79.) Therefore, the brakes on those three cars were in good condition two days before the accident. The day before the accident when these same six cars were on Albion Siding No. 2, the testi-

mony shows (Record, pp. 213 and 292) that the shifting engineer endeavored to pull them out and was unable to do so because the hand brakes held them. This shows conclusively that all the braking apparatus on the six cars was in good condition after the derailment (which Riegel laid some stress upon, saying there might be a possibility of its affecting the efficiency of the brakes) and up until the day before the cars escaped. Therefore, it is plain that had any of the defects which Riegel specified existed, the defendant company had no knowledge of them and had no opportunity of ascertaining their existence.

Before Riegel's testimony could be said to show any negligence, it would have been necessary for the plaintiff to have shown that the defendant knew, or should have known, of these defects. No such knowledge was in any way imputed to the defendant, and all the testimony shows that the braking apparatus was in good condition until within a few minutes before they were finally used by defendant's employees. *Hence there could have been no knowledge and no opportunity for knowing of the existence of any of the defects which Riegel mentioned.* So that it would appear that admitting, for the sake of the argument, that this testimony was relevant, and admitting that certain of the possibilities which he mentioned existed, still the plaintiff cannot ask that the case go to the jury, for the reason that the defendant was not shown to have had any knowledge, or any opportunity of knowing of, the existence of the defects.

Moreover, his evidence and all the evidence left the reason for the escape of the cars purely a matter of conjecture.

Could Riegel himself select one of the "possibilities" he offers and say that it caused the accident? If the entire matter is one of conjecture, surely then the judgment must be for the defendant, for at its

best the evidence of the plaintiff leaves the matter one of guessing. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. In *Patton vs. Texas and Pacific Railway Co.*, 179 U. S. 658, 663, Mr. Justice Brewer said:

"It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. *And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.* If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

MARSENA PARSONS.

In addition to Riegel's testimony, the plaintiff and the court were apparently of the opinion that the testimony of Marsena Parsons (coupled with evidence of certain slate workers, who said that at or near the time the six cars escaped they had seen no one on them) strengthened plaintiff's case. We will not discuss this evidence.

Marsena Parsons (Record, pp. 97-105) testified in substance as follows:

That he was a slater and worked for Parsons

Brothers, and on July 21, 1909, worked at a quarry at West Albion, about three hundred feet from the track. That he knew nothing about the cars running away until 9 A. M. of the 21st, when some one told him of it. That on the afternoon of July 20, 1909, he noticed one (and only one) block under the front wheel of the car nearest the frog of the switch, and the flange of the wheel had cut partly through this block, which was from two to four feet long and three by six inches otherwise. That on the 21st, about fourteen hours later, as he walked by the same block (each time within fifteen feet of it) he noticed that the flange had cut farther through the block; that the impression made by the flange was deeper in the morning than it had been on the previous evening, and that in the morning it was almost cut in two. That he did not notice the brakes at all. That he saw no one on the cars, or interfering with them, but did see twenty-five or thirty people passing them at that time on their way to work. He ended his re-direct examination with this sentence:

"I believe that I said that the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the block seemed to be deeper" (Record, p. 105).

That he got this impression from a glance ("just a glance") as he passed by about ten or fifteen feet away.

In addition to the foregoing synopsis, certain extracts from his testimony herewith given are as follows (Record, p. 99):

"Q. Just tell the court and jury what you noticed on the morning of the day the cars ran away.

A. I noticed that the stick that they had under the cars to block the cars with, was almost cut in two. That was the only thing that I noticed.

Q. How far through that block had the wheels cut?

A. I cannot be so positive, but I should judge about three-fourths of the way, perhaps more.

Q. Had you seen these cars before that? The afternoon before?"

Record, page 100:

"A. On the afternoon before; yes, sir.

Q. Had you noticed the position of the block then?

A. The impression in the block was not as deep as it was in the morning.

Q. Did you take notice of the brake shoes at all, whether they were tight?

A. No, I did not."

Record, page 101:

"Q. Was it there in the morning, that same morning?

A. That same morning; yes, sir.

Q. I do not mean the morning of the accident now, but the morning of the previous day?

A. No, I will not say anything about that. I am not positive about that. I did not notice it.

Q. You did, however, take particular notice that night and the next morning?

A. Yes, sir.

Q. What attracted your attention? Why did you make such a personal investigation of it?

A. I passed right close to it, within about ten feet of it, and I noticed the block, and that the wheel had cut into it, and the impression was just simply in my mind that the brakes were not on and that was put there to keep the cars there."

Record, page 105:

"Q. You have said you saw these cars and the block under the front car the previous after-

noon, and you saw them again the morning of the accident, about quarter of seven?

A. Yes, sir.

Q. Had or had not these cars moved any in that time, according to your judgment?

A. *I believe that I said the impression in the stick seemed to be deeper. That was my impression, but the movement of the cars was not noticeable. I could not say that the cars had moved. The impression in the stick seemed to be deeper.*

Q. You judge it over a distance of fifteen feet?

A. Yes, sir.

Q. How long a time did it take you to examine this block when you first went there the evening before?

A. *It was just simply a glance as I passed it.*

Q. What was it the next time?

A. *The same thing, just a glance."*

Defendant contends that this evidence does not show anything of importance. Of course, the brakes were off when the cars escaped. Every one agrees as to that, and this evidence only goes to prove that the brakes were off when the cars escaped. Defendant is quite in accord with that proposition, for otherwise the cars would have remained on the siding.

But proof of the fact that the brakes were off when the cars escaped, or even proof that the brakes were off twelve hours before the cars escaped (and Parson's evidence does not go so far, because his only means of comparison was the impression made on the blocks on the evening before, with the impression made on it the morning the cars escaped, while he distinctly admits that he did not notice the block on the morning before the morning of the escape) is no proof whatever that the brakes were not originally set, as testified to positively and unequivocally by both sides.

Moreover, the testimony is most vague and unsatisfactory. He got the "impression" on his mind

that the block was more cut into on the morning than it had been the evening before. This impression he obtained from "just a glance" when he was walking by, about ten or fifteen feet away. Such testimony is of so little value that it need not be considered; and to say that it could have any weight against the positive and uncontradicted evidence of both sides that the brakes were properly set and were ample to hold the cars is monstrous. And furthermore, is it not strange that with the impression on his mind that the brakes were not on and that the block was put there to hold the cars, he should have to admit that he did not notice the brakes at all. He was impressed with the fact that the brakes were not on, and yet he did not give his "glance" to see whether they were or not.

It would seem clear from any impartial study of the testimony that the plaintiff had not made out a case from which a jury could possibly say that the defendant was negligent. Of course the cars escaped, and of course the brakes were not on when they escaped, but that shows nothing more than the happening of an accident; and the law is clear and settled, that under such circumstances the plaintiff employee has not made out a case against an employer. All the witnesses testified that the cars were actually braked and blocked, that the brakes were in good condition, and that with the brakes and blocks so set, the cars could not have escaped.

How or why the brakes became loosened is a matter of mere guess work, and until plaintiff produces some definite evidence to solve the question, she cannot ask a jury to say by speculation that the cause was one for which this defendant should be responsible.

It should be borne in mind that there is *no question as to the weight of the evidence* which was to be left to the jury, because both sides agree on three facts:

(1) The brakes were in good condition when finally set.

(2) The cars were braked and blocked properly and sufficiently.

(3) The cars could not have escaped unless the brakes were released by some unknown means.

2. THE CASE WAS RES JUDICATA.

It is the contention of defendant in error and always has been that the former action brought by Lizzie M. Troxell as widow for the benefit of herself and children, which she lost in the Circuit Court of Appeals for the Third Circuit, completely bars the present action brought by her as administratrix for the benefit of herself and children.

The subject for convenience of argument will be divided as follows:

(a) *Right of Circuit Court of Appeals to consider record of former appeal.*

(b) *Former case must have been tried under Employer's Liability Act.*

(c) *Res judicata.*

1. *Parties were identical or in privity.*

2. *Cause of action same.*

(d) *Federal Employer's Liability Act not exclusive in case at bar.*

(a) RIGHT OF CIRCUIT COURT OF APPEALS TO CONSIDER RECORD OF FORMER APPEAL.

The fourth and fifth assignments of error pressed by plaintiff in error raise the question of the right of the Circuit Court of Appeals for the Third Circuit, to have used and referred to the record on the former

writ of error in the prior action because the same was not printed *de novo* in the record of the present action.

At the trial of the present action defendant pleaded *inter alia* the judgment of the former action in bar and formally offered the record in evidence (Record, pages 13 and 209). That one of the grounds pressed by defendant in Circuit Court of Appeals for reversal was that the entire matter was *res judicata* by the former action. In order to save encumbering the record of the present action in the Court of Appeals, in view of the fact that the record of the former action was part of the records of that court and within its judicial cognizance, the defendant did not print anew the record of the previous action offered in evidence, but did file a copy thereof with the clerk of the court and at the oral argument handed up to the judges printed copies of the former record as part of the record in the present action, which the court considered. Counsel for plaintiff in error made no objection whatever to the Circuit Court of Appeals and raises the question for the first time here.

It is submitted that the Circuit Court of Appeals had a perfect right under the following authorities to consider such record, because it was not only before them, without objection, but was a part of their own records (the first cause having been considered by them on writ of error in the former case, File No. 1432).

In 3 *Cyclopaedia of Law and Practice*, page 179, it is said:

"Matters of which an appellate court may take judicial notice need not be incorporated in the record in order to be considered." (Citing numerous cases.)

In *Schneider vs. Hesse*, 9 Ky. L. R. 1814, it was held that the appellate court takes judicial notice of

its own records so far as they pertain to a case under consideration, and therefore it would judicially know that the judgment appealed from was affirmed upon a former appeal to which all the parties to the present appeal were parties, and such judgment is consequently a bar to the prosecution of the present appeal.

Thornton vs. Webb, 13 Minn. 498, wherein it was held that in a subsequent action in which the pendency of a former action was pleaded as a defense, the Supreme Court, on appeal, for the purpose of upholding the determination of the court below, would take notice of the fact appearing by its own records, that an order of dismissal had been entered in the appeal in the previous action before the commencement of the second action.

In *Butler vs. Eaton*, 141 U. S. 240, the court took judicial notice of the fact that it had reversed another case which had been pleaded in bar of the action under consideration.

In *Aspen Mining & Smelting Co. vs. Billings*, 150 U. S. 31, the court took judicial notice from its own records of another proceeding in the case.

As it also did in the case of *Craemer vs. State of Washington*, 168 U. S. 124.

In *Thompson vs. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, it was held that:

“The Supreme Court takes notice of its own opinions, and although its judgment and mandate express the decision of the court, yet it may properly examine its opinion on a prior appeal or writ of error, in order to determine what matters were considered, upon what grounds the judgment was entered, and what was settled for the future disposition of the case.”

In *re Durrant*, 169 U. S. 39, the court said by Mr. Chief Justice Fuller:

"The judgment of this court affirming that order was rendered, as we know from our own records."

Mr. Justice Brewer in *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212, said at page 217:

"Will not the judgment or decree in the first be held a final adjudication of the rights of the parties? It appears that the decree in the other suit was rendered in the circuit and affirmed in this court about seven months before the decision of the present case in the Circuit Court. As against this, it may be said that the decree in the other suit was neither pleaded or proved, and no question of *res judicata* can be considered unless the earlier decision is formally presented on the hearing of the later case. This, doubtless, is technically true, *but we take judicial notice of our own records*, and, if not *res judicata*, we may, on the principle of *stare decises*, rightfully examine and consider the decision in the former case as affecting the consideration of this."

In *Dimmick vs. Tompkins*, 194 U. S. 540, Mr. Justice Peckham said at page 548:

"In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler vs. Eaton*, *Craemer vs. Washington*, *Bienville Water Supply Co. vs. Mobile*."

The Circuit Court of Appeals had therefore a perfect right to consider the printed record on the former appeal because, it was not only offered in evidence at the trial and copies furnished at the argument but was part of the records of that court and was a proper subject for judicial notice of the court.

**(b) FORMER CASE MUST HAVE BEEN TRIED
UNDER EMPLOYER'S LIABILITY ACT.**

This thought is expressed by Judge McPherson, for the Circuit Court of Appeals, in its opinion reversing the judgment of the lower court in the present case, where he says (Record, pp. 334-335):

"When the first suit came on for trial the scope of the Employer's Liability Act of 1908 had not been passed upon by the Supreme Court, and the Circuit Court did not have the benefit of the elaborate opinion delivered in the several cases reported in 223 U. S., page 1. Among the points there decided is this (p. 54):

"True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon and because the subject is one which falls within the police power of the states in the absence of action by Congress. . . . The inaction of Congress, however, in no wise affected its power over the subject. . . . And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is . . .'

"It follows, that the first suit was governed not by the law of Pennsylvania, but by the act of Congress; and indeed the statement of claim was evidently drawn from that point of view. It averred (and the present statement also avers) that:

"On or about the twenty-first day of July, 1909, said Joseph Daniel Troxell, the husband of said widow, Lizzie M. Troxell, was employed by said defendant corporation in the capacity of fireman on a locomotive, pulling and hauling one of said defendant's trains, carrying interstate and foreign commerce and traffic, and on and about the cars, tracks, roadbed and right of way used and

employed by said defendant in its interstate and foreign commerce and traffic, on and about the Bangor and Portland Railway Company, owned, controlled, operated and directed by said defendant, at and near the town of Belfast, Northampton County, Pennsylvania.'

"It is true that after the evidence had all been heard at the first trial her counsel attempted to limit the ground of the plaintiff's claim, evidently supposing that he could abandon the act of Congress, and stand upon her former rights under the law of Pennsylvania. The reason for this effort does not concern us, but it was necessarily ineffective, for it is clear that the act of Congress had superseded the law of the state in this class of cases, and that the plaintiff could not rely on a law that had ceased to govern litigation to redress injuries suffered in interstate commerce. Evidence had been offered to prove negligence of two kinds: first, the absence of a derailing switch at the opening of Albion siding, No. 2; and second, the failure of Troxell's fellow servants to use care in securing the cars upon the siding by the use of brakes and blocks. The plaintiff decided to abandon the second charge—which would have been unavailable under the law of the state—although the act of Congress allowed her to prove and rely upon both averments. Both were embraced in the very general language of her statement of claim, and she had offered evidence in support of both. In this suit she abandons the first charge and is relying wholly upon the second; but it is plain we think that she could not confine the first action to the failure to provide a derailing switch while she held in reserve as the ground of a second suit the failure to properly secure the cars. It is not necessary to discuss this well known rule: *Lim Jew vs. United States* (C. C. A.), 196 Fed. 736. She is merely offering more evidence now to prove certain facts that she might have proved, but came short of proving, at the former trial: *Worrell vs. Kemmerer* (C. C. A.), 192 Fed. 911, S. C. (D. C.) 185 Fed. 1002.

"If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of *res judicata* must be applied. In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie M. Troxell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors. The company did not object to the form of the suit, but we cannot doubt that if objection had been made the court would have allowed an amendment so as to put her on the record as administratrix. The statement of claim in the present action is identical with the statement in the first, except that she now sues as administratrix; but she again avers (as she did before) that she brings the action for the benefit of herself and the children. Save in mere form, both actions are for the sole benefit of the same persons, and we think the proposition that the parties do not differ cannot be made clearer by elaboration. It is true that in the ordinary case of a suit brought by an administrator he represents the estate, and of course he is then suing for the benefit of creditors as well as for the next of kin. But this is not the ordinary case; the persons for whose benefit recovery may be had are expressly pointed out by the act of Congress, so that an administrator suing under the act does not sue for the estate, but solely for the persons named. *Where (as here) it otherwise appears that the proper beneficiaries are the only persons interested in the action, the omission to sue as administrator is a technical omission only, curable by amendment*; the substance of the action is that the surviving parent and the children (or the other persons named in the act), are suing—since they, and they only, are entitled to the benefit of the judgment, *R. R. Co. vs. Evans (C. C. A.)*, 188 Fed. 6. This being so, it seems to us that the two actions are identical in all essential particulars, and that the second suit cannot be maintained."

Amendments of matters of form in process, etc., in Federal courts are not governed by state law, as suggested in brief for plaintiff in error (p. 23, et seq.), and therefore not within the purview of the Conformity acts.

Such subjects are covered by act of Congress, Revised Statutes, Sec. 954, as follows:

“No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form, but such court shall proceed and give judgment according as to the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.”

Therefore as suggested by Judge McPherson in his opinion reversing the present action in the Circuit Court of Appeals, plaintiff in error must have tried the former action under the Federal Employer's Liability Act, and as the administratrix was a mere formal party, she could have been substituted at any time as nominal plaintiff, by amendment.

In *St. Louis & San Francisco R. R. vs. Herr*, 193 Fed. 950 (C. C. A. Fifth Circuit), we have a case where an amendment under this section was allowed after verdict. The court held that:

“Where plaintiff, who was the sole heir and administrator of decedent, sued in his representative capacity for decedent's death, instead of in

his individual capacity, as required by statute, the court should, under revised statutes, 954, in furtherance of justice, permit him to amend the declaration changing the capacity in which the action is brought."

Judge Shelby in his opinion said at pages 951-2:

"After verdict was rendered for the plaintiff, and after a motion for a new trial was overruled, the defendant moved in arrest of judgment on the ground that the suit had been brought by an administrator when there 'was in existence next of kin, to wit, a brother of plaintiff's deceased.' . . . The plaintiff being both the administrator and sole heir and distributee the suggestion means that the plaintiff has sued in the wrong capacity, and that he should have sued as heir distributee and not as administrator. It is urged in this court with great earnestness and ingenuity that the judgment should be reversed; that, where there is an heir, the administrator cannot sue, but the action must be brought in the name of the heir; on the trial below, and when the case was in this court on the first writ, it seemed to be assumed by both parties that this was a case in which the 'legal or personal representative' of the person killed could sue. But, assuming that the position of the defendant is correct, that the action should have been brought by W. A. Herr individually and not as administrator, does it follow that the judgment should now be reversed? The plaintiff is both the administrator and the sole heir of the decedent. He is the person entitled to whatever is recovered by the suit. He having sued 'as administrator,' instead of individually, if the suggestion had been made by plea, or notice that the defendant claimed that the action was erroneously brought, the declaration could, if the court sustained that view, have it amended by striking out the words, 'as administrator,' etc., and permitting the suit to proceed individually. While it is often held that an entire change of parties plaintiffs cannot be made by amendment, it is

also held that when a party sues in his own right he may, if the facts warrant it, amend his declaration, so as to make the suit stand in a representative capacity, and, conversely, if he sues as a representative, he may be allowed to amend by declaring in his individual capacity. The Federal statutes provides that the court 'may at any time permit either of the parties to amend any defect in the process or pleading . . .' (Revised Statutes, Sec. 954). Where the plaintiff is both the sole heir and the administrator of the decedent and sues in the wrong capacity for damages for his death, he should in furtherance of justice, be permitted to amend his declaration 'changing the capacity in which his suit is brought.'

Van Doren vs. Pa. R. R., 93 Fed. 260, 268 (C. C. A., Third Circuit)."

In the case just cited the court holds that where the plaintiff, who is both widow and administratrix of the decedent, in bringing an action under a statute, to recover damages for his death, sued in the wrong capacity, the court should, in furtherance of justice, on seasonable application, allow an amendment, changing the capacity in which suit was brought in order to conform to the statute, where such amendment will not change the issues, the measure of recovery, or in any way prejudice the defendant. This latter case is almost identical with the one at bar, Judge Bradford, speaking for the court, said in the opinion at page 267:

"If the application by the plaintiff for leave to amend was seasonably made, should it not have been granted? She asked to be allowed to declare as the widow of Henry Van Doren in conformity with the requirement of the statute of Pennsylvania, and to substitute the widow of Henry Van Doren for his administratrix as the plaintiff. The proposed amendment would not, if properly allowed, have changed the cause of action or affected

in any manner the measure of proof necessary to establish the alleged tort. It would not have changed the issue to be tried or have increased or diminished the amount to be recovered. It could not have operated to the prejudice of the defendant. It would merely have changed the capacity in which the suit should be prosecuted by Laura L. Van Doren from that of administratrix to that of widow of the decedent, thereby conforming to the Pennsylvania statute. It could have been of no consequence to the defendant who should ultimately receive the amount of any verdict against it, if the final judgment rendered in the action would bar a second suit for damages for the death of Henry Van Doren; and that the judgment would have operated as such bar we have no doubt. In fact it appears from the declaration that Henry Van Doren left to survive him several children, and under the intestate laws of New Jersey had the injury been received in the latter state and the action been successfully prosecuted under the statute thereof. *Pepper & L. Dig. Pa.*, pp. 2408, 2410; 2 *Gen. St. N. J.*, p. 2389. Nor would such an amendment have been repugnant to the one-year limitation prescribed by the Pennsylvania statute. *Railway Co. vs. Cox*, 45 U. S. 593, 603, 12 Sup. Ct. 905. With such an amendment, properly allowed, the declaration would have set forth a clear right of action under that statute. If a person who is both widow and administratrix sues in the wrong capacity the action may be defeated and great hardship result unless an amendment be allowed permitting her to prosecute the action in the right capacity. There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted where substantial justice requires it. *Wood vs. Circuit Judge*, 84 Mich. 521, 47 N. W. 1103, is a case much in point."

In *Reardon vs. Balaklala Con. Copper Co.*, 193 Fed. 189, the Circuit Court of California allowed such an amendment even after the statute of limitations had run.

(c) RES JUDICATA.

(1) *Parties were identical or in privy.*

The Pennsylvania statutes giving the right to a widow to sue in her own name, for the benefit of herself and children, for the wrongful death of her husband by violence or negligence, is as follows:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned." Act of April 15, 1851, Sec. 19, P. L. 674.

"The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." Act of April 26, 1855, Sec. 1, P. L. 309.

The Pennsylvania Supreme Court in construing the above statutes, held, in *Railroad Company vs. Conway*, 112 Penn. 511, that where there is a widow and minor children the suit should be brought by the widow alone, for the benefit of herself and children, and the damages divided in the proportion they would take under the intestate act and free from the claims of creditors.

The Federal Employer's Liability Act of 1908

provides that the action shall be brought by the administrator for the benefit of the widow and children.

As has been repeatedly said, the former action was brought by Lizzie M. Troxell, under the Pennsylvania acts, to recover damages against the defendant by reason of its alleged negligence causing the death of her husband, Joseph D. Troxell, for the benefit of herself and minor children.

In the present action she sues as administratrix under the Federal Employer's Liability Act of 1908, to recover damages, for the same death, from the same accident and for the benefit of the same parties, viz., herself and minor children.

Now are these parties the same in both actions, or in privy with each other?

When the present action was first instituted defendant pleaded both "Not Guilty" and "Res Judicata" (in that the former action was a bar). Plaintiff obtained a rule to strike off the latter plea and Judge Holland discharged the same, saying in his opinion (reported in 185 Fed. 540):

"The parties to the above entitled suit are identical with those in the suit instituted September 3, 1909, April Term, 1909, No. 694, Fed., 871. The plaintiff in that suit was Lizzie M. Troxell, who brought the action on behalf of herself and two minor children against this same defendant to recover damage, under and by virtue of the act of the legislature of Pennsylvania, authorizing a recovery for the wrongful death of her husband in an action to be brought by her for her benefit and the benefit of her minor children. The present action is instituted by her as administratrix, under the Federal Employer's Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 Stat., 65 [U. S. Comp. St. Supp., 1909, page 1172]), which requires the action to be conducted by the personal representative but for the sole benefit of the widow and minor children. Lizzie M. Troxell as administratrix in

the present case represents the same identical parties that she represented in the former suit, and the fact that in the former suit she represented these same parties in her individual capacity and now represents them in her capacity as an administratrix is not sufficient to establish a difference of identity of parties to the suit.

"In determining who are parties, courts will look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts and controls the action or defense, and will hold him concluded by the judgment rendered; where the real parties are substantially the same in both cases, or where the parties to one were parties by representation to the other, the former judgment is conclusive. *Taylor vs. Cornelius*, 60 Pa., 187; *Pepper & Lewis' Digest of Decisions*, Vol. 10, page 16, 849; 23 Cyc., 1215.'

"It is true that, in order that a party may be bound by a former judgment, it is not only necessary that he should have been a party to both actions, but he must appear in both in the same character or capacity. A suit or defense in his individual capacity in one action is not binding in another, if he appears in the latter in a representative character, such as guardian or next friend, because he then in fact represents different parties; but where, as in this case, Lizzie M. Troxell represented the same parties in her individual capacity, under the Pennsylvania act, that she now presents in this suit in her capacity as administratrix, under the federal act, there is an identity of parties in both suits. 23 Cyc., 1243, 1244."

The Circuit Court of Appeals for the Third Circuit had no doubt but what the parties were the same in both actions for they say in Judge McPherson's opinion (Record, p. 335):

"If, therefore, the suit now before us is between the same parties, it is based upon the same cause of action, and the rule of *res judicata* must

be applied. *In our opinion the parties are essentially the same. It is true that in form the first action was brought by Lizzie M. Trozell as an individual, but the statement of claim shows it to have been on behalf of herself and the two children, both of them minors.*"

In the case of *Butler vs. Eaton*, 141 U. S. 240, Mr. Justice Bradley at page 242 said on this subject:

"It was not nominally between the same parties, it is true. It was a judgment recovered by Mary J. Eaton against the Pacific National Bank, whereas the present action is an action between Butler, the receiver of the said bank, and the said Mary J. Eaton. We are inclined to think, however, that the court below was right in determining that the two actions were substantially between the same parties, inasmuch as a receiver of a national bank in an action and suits growing out of the transactions of the bank, represents it as fully as an executor represents his testator."

(2) *Cause of action same.*

If the parties are the same and the cause of action the same it conclusively follows that the first action is *res judicata* of the second.

The two actions were brought by the same parties against the same defendant, in the same court, tried before the same judge, to recover damages for the same death in the same accident.

The learned trial judge permitted the present case to go to the jury upon the theory that under the Pennsylvania law the question of the negligence of the Pen Argyl yard crew in regard to the manner of braking and blocking these six cars was not adjudicated, for the reason that under the Pennsylvania statute there could have been no recovery in the first case for this species of negligence which is permitted under the Federal Employer's Liability Act.

A. IF THE MATTER WAS ADJUDICATED AS TO PART, IT WAS ADJUDICATED ENTIRELY.

B. THE QUESTION OF THE NEGLIGENCE OF A FELLOW-WORKMAN REALLY WAS ADJUDICATED IN THE PRIOR CASE, BECAUSE EVEN UNDER THE PENNSYLVANIA STATUTE, AND THE GENERAL LAW, RECOVERY IS PERMITTED AGAINST THE COMMON EMPLOYER WHOSE ALLEGED NEGLIGENCE (IN THE PRESENT INSTANCE IN NOT FURNISHING A DERAILING SWITCH) CONCURRED WITH THE NEGLIGENCE OF A FELLOW SERVANT TO CAUSE HARM TO THE PLAINTIFF.

C. THE QUESTION AS TO WHETHER OR NOT THE CARS WERE LEFT PROPERLY ON THE SIDING WAS DIRECTLY AN ISSUE AS A DEFENSE IN THE FORMER SUIT, AND WAS DIRECTLY DECIDED SO AS TO BE RES JUDICATA.

(A) If the matter was adjudicated as to part, it was adjudicated entirely.

The learned trial judge admits that the parties to this action are the same as the parties to the prior action. The cause of action he states to be the same, except that under the Federal Employer's Liability Act recovery is permitted for the negligence of a fellow servant, and such a recovery is not permitted under the Pennsylvania act. In other words, the learned trial judge's decision on this point is, that if there are two statutes, one giving somewhat broader rights to a plaintiff than the other, and the plaintiff adopts one statute and proceeding thereunder is defeated, she can then proceed under the other statute and recover upon a ground not recognized in the first statute. This decision would lead to this result:

Suppose the Pennsylvania act were identical to the Federal Employer's Liability Act, save only that the latter provided that the plaintiff could recover for the pain and suffering of the decedent, which provision was not contained in the former. Can it be

maintained that the same plaintiff could sue the same defendant for the same cause of action under the first statute and having been defeated therein, upon the merits of the case, could then come under the other statute and recover damages for the pain and suffering of the decedent, upon the ground that this matter had not been adjudicated in the former proceeding, because the statute made no provision for recovery for this damage?

Or suppose, for the sake of argument, there were two federal employer's liability acts—one which did not permit recovery for the negligence of a fellow servant, and another which did. Can it be maintained that having failed to recover under the first act, the plaintiff could proceed under the second act and recover?

If the plaintiff, by a mistake of her own, elected to proceed under the statute which did not give her as broad rights as the Federal Employer's Liability Act gives her, and was defeated in her first action upon the merits of the case, it is idle to contend that she may now proceed under the broader grounds of the Federal Employer's Liability Act.

The right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, in the first of these suits was whether or not this defendant was liable to this plaintiff for the death of Troxell. It was not the narrow question as to whether or not this defendant was liable to this plaintiff for the death of Troxell, because of a *particular species* of negligence, to wit: the lack of a derailing device; but it was the broader question of whether or not there was any liability to this plaintiff for this death due to defendant's negligence.

In the case of *MacDonald vs. Grand Trunk R. Co. of Canada* (71 N. H. 448), 59 L. R. A., "Old Series" page 448, the facts were as follows:

Plaintiff shipped certain goods from Glasgow, Scotland, destined to Toronto, Canada. They were received at Portland, Maine, by defendant railroad from the steamship company, and while in transportation across the state of Maine were destroyed due to defendant's negligence. Plaintiff sought to hold the defendant liable for the loss in the Canadian courts and judgment was there rendered for the defendant upon the merits. The shipment was made under a bill of lading, which contained certain limitations as to liability that were valid under the law of Canada and were not valid under the law of New Hampshire.

After having judgment rendered against him in the suit brought in the Canadian courts, the plaintiff brought a second suit against the same defendant for the same accident, alleging that the matter was not *res judicata*, for the reason that a different cause of action existed because this limitation of liability was invalid under the New Hampshire law. The New Hampshire court held that the matter was *res judicata*, and that the plaintiff was barred by his former suit from claiming now in the New Hampshire courts.

From this decision, which is far stronger than the case at bar, because the former judgment in the New Hampshire case was rendered by a foreign court and not by the very same court in which the first suit was brought, the law seems clear that this plaintiff, in the case at bar, is not entitled to bring the present action, for if a judgment rendered by a foreign jurisdiction upon the merits of the case will bar that plaintiff from suing upon the same facts, which in a state court gave him *different rights*, how much more is this plaintiff, who has once sued in this same court and had a decision rendered upon the merits, barred by that decision from suing in the same court upon an alleged different right arising by virtue of a Federal statute from the same facts?

Columb vs. Webster Mfg. Co., 84 Fed. 259 (C. C. A.).

ALDRICH, District Judge: "This is an action to recover for damages which the plaintiff claims he sustained by reason of the defendant's negligence in New Hampshire. The plaintiff brought a prior suit in the New Hampshire state courts against this defendant, and for the same injury, where he had his trial upon the merits, and upon a cause of action involving the defendant's alleged negligence as a ground of recovery, and where there was a verdict of the jury and judgment for the defendant, and the defendant in the Circuit Court interposed such judgment as a bar to the further prosecution of the plaintiff's action therein.

"We think the New Hampshire judgment is a bar to the plaintiff's second action, and it seems quite unnecessary to add anything to the reasoning of the court below. It may be observed, however, that the cause of action (that of the defendant's negligence in respect to the same affair) was identical in both proceedings, although the plaintiff, in this, his second proceeding, varies somewhat his description of the defendant's negligence. *It remains, nevertheless, that this action was brought for the same injury, and that the action is grounded on the defendant's fault or negligence in respect to the same occurrence.* In the New Hampshire case the plaintiff alleged the defendant's want of care in respect to its duty to furnish a suitable and safe place for the performance of the service which he was expected to render, and that, by reason of the careless and negligent construction of the bridge or trestle, and 'by the sudden giving away of said trestle or railroad,' he was 'thrown into the river below,' and injured, while in the proceeding here he alleges that 'an unsupported section or part of said bridge, on which plaintiff was so assisting as aforesaid, fell, and, owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neg-

lect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff was precipitated into the said river,' and was injured. The cause of action in the two proceedings is obviously the same. *In the proceeding here the plaintiff alleges other elements of negligence, which he in effect says co-operated with the elements of negligence alleged in the first proceeding to bring about the same result; in other words, he alleges here additional acts of negligence, operating upon the same occurrence, and tending to the same result.*

"The Supreme Court decisions are quite decisive, and controlling upon the question before us. In the case of *Beloit vs. Morgan*, 7 Wall. 619, it is said, with reference to a former trial before a court having jurisdiction over the parties and the subject, that 'under such circumstances a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject-matter, though the *res* itself may be different.'

"The additional allegations of negligent acts, in the case at bar, are (as said of the new evidence in *Southern Pac. R. Co. vs. U. S.*, 168 U. S. 1, 65, 18 Sup. Ct. 18) 'simply cumulative,' and they merely present elements of negligence which were, in contemplation of law, at least for the fair and reasonable purposes of the *res judicata* rule, involved in the affair originally complained of, and in the single and indivisible cause of action originally set out,—that of negligence and fault of the defendant which occasioned the injury to the plaintiff. *Beauregard vs. Construction Co.*, 160 Mass. 201, 203, 35 N. E. 555; *Patterson vs. Wold*, 33 Fed. 791, 793. The reasons for the *res judicata* rule have been stated again and again, and they include, among other considerations, the idea that the interests of the public and of litigants alike require that a legal controversy should end with one investigation before a tribunal with

ample jurisdiction to do justice, and with ample opportunity for the parties to present their case with such measure of statement and proofs as they see fit. A rule which would allow the plaintiff to split his case, and measure out a part of his grievance and of his proofs, and, in the event of failure, to try again upon a greater measure, would necessarily allow the defendant to stand on a part rather than all of his defense to a given cause of action, and, if this should prove insufficient, a second trial upon a more full statement and a greater measure of proofs would be open to him. Under such a rule, litigation would at once become burdensome and oppressive, interminable and never-ceasing,—a condition which the modern law seeks to avoid, and a situation which the courts of the present age are not disposed to aid in creating.

“Is there any safe or reasonable ground upon which a cause of action based upon the supposed negligence of an employer can be treated as divisible? Is there any reason for a rule which would permit a plaintiff by varying his description of negligence, to have a second trial, if he fails to succeed upon his first description and proofs, but deny him a second trial if he does succeed? No reason has been urged in support of such a rule of law, and it is difficult to see that any could be suggested. Then let us look at the question with reversed light. Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleged additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery.”

To the same effect are the following cases:

Marshall vs. Bryant Electric Co., 185 Fed. 499;

Hein vs. Westinghouse Co., 172 Fed. 524;

Forsythe vs. Hammond, 166 U. S. 506;

Cromwell vs. Sac, 94 U. S. 351;

Clare vs. N. Y. and N. E. R. R., 172 Mass. 211;

The New Brunswick, 125 Fed. 567;

Hubbell vs. U. S., 171 U. S. 203.

Under the learned trial judge's decision and the contention of plaintiff in error here, if the plaintiff could have shown some other particular species of negligence, for which the Pennsylvania statute did permit recovery, then this case would not have been *res judicata*, even under that act, but plaintiff could have had it tried a second time under the Pennsylvania statute for the different species of negligence alleged. It is submitted that this is clearly not the law, and that the question that has been once judicially determined by the first suit is: Is this defendant liable to this plaintiff for the death of her husband due to defendant's negligence, and not the narrow question: Is this defendant liable to this plaintiff for the death of her husband due to defendant's negligence in that defendant did not furnish a derailing device.

It is submitted that the theory of the learned trial judge as to what the first case decided is too narrow, and that the first action decided the entire question once and for all. This contention is made clear by a glance at the opinion of the learned trial judge in refusing a new trial in the first action when he said (180 Fed. 871, at p. 878):

"The question of the defendant's negligence *under all the circumstances* was a question of fact and it was properly submitted to the jury for their consideration. . . ."

(B) *The question of the negligence of a fellow-workman was adjudicated in the prior case, because even under the Pennsylvania statute recovery is permitted against the common employer whose alleged negligence (in the present instance in not furnishing a derailing switch) concurred with the negligence of a fellow-servant to cause harm to the plaintiff.*

It is a principle too well known to need authorities to support it, that "a judgment on the merits rendered in a former suit between the same parties or their privies on the same cause of action by a court of competent jurisdiction is conclusive not only as to every matter which was offered and received to sustain or defeat the claim *but as to every other matter which with propriety might have been litigated and determined in that action*" (23 Cyc., p. 1170).

In other words, if under the Pennsylvania statute, plaintiff could have recovered in the first action had she shown that the negligence of the defendant, together with the negligence of a fellow workman of plaintiff's decedent, caused the death of decedent, then the question which was left to the jury in the case at bar might have been left to the jury in the first case and the result would clearly be that the matter is *res judicata*. For if the defendant would have been liable to the plaintiff under the Pennsylvania act or general law for its alleged negligence, upon the theory that the defendant's negligence in not having a derail concurred with the negligence of plaintiff's fellow workman in not properly braking the cars, and that these two negligent acts together caused decedent's death, then the learned trial judge would not be correct in his charge to the jury when he said:

"In that case, gentlemen of the jury, under the Pennsylvania law, this defendant could not be held liable for any negligence on the part of a fellow workman of Joseph Daniel Troxell, resulting

in his injury; in other words, under the Pennsylvania law this defendant could not be held liable if Joseph Daniel Troxell's death was caused by reason of the negligence of another crew working on the same road with him putting those cars in there, because the law of Pennsylvania is that the negligence of a co-employee, negligence of fellow servants with one another that results in another's injury, does not make the railroad company, or the common carrier, liable. So that, under the other suit under Pennsylvania law, even if it had been established that the putting of those cars in there was negligent, the plaintiff could not have recovered upon that ground; but in that suit the plaintiff said she was entitled to recover, under the Pennsylvania law, upon the ground that the Pennsylvania law requires a common carrier or railroad company to have proper and safe machinery, reasonably safe, and to adopt all devices and appliances to make the machinery and road-bed reasonably safe, and that the defendant did not have a derailing device where these cars were put in and, therefore, the defendant was negligent and had violated that principle of liability under the Pennsylvania law."

Defendant's present contention is that if defendant would have been liable to plaintiff under Pennsylvania statute or general law upon the theory of concurring negligence, then the matter is *res judicata*.

It is submitted that the law of Pennsylvania is that where a plaintiff shows that the death occurred due to a concurrence of negligence upon the part of one of decedent's fellow workmen and the part of the co-employee, then the plaintiff can recover.

Kaiser vs. Flaccus, 138 Pa. 332.

In this case the lower court charged:

"That the concurring negligence of a fellow servant with the negligence of the master will not relieve the master of liability."

This point was assigned for error but was abandoned by the appellant in their argument before the Supreme Court.

However, in the case of

Wallace vs. Henderson, 211 Pa. 142,

Chief Justice Mitchell states that the charge of the lower court in the above case is the law of Pennsylvania, and "is in accordance with the weight of the authorities in other states."

The same rule has expressly been made the law in Pennsylvania by the act of June 10, 1907 (P. L., 523), which provides specifically that where the negligence of a fellow employee concurs with the negligence of a master in not providing a safe place to work, etc., to the harm of a plaintiff workman, the master shall be liable.

The same rule is the law in the Federal courts, as may be seen in the case of:

Kreigh vs. Westinghouse Co., 214 U. S. 249,

in which Mr. Justice Day says:

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work" (citing cases).

A quotation taken from the brief filed by plaintiff's attorney in the Circuit Court of Appeals, in the former case will clearly show that at that time this same thought was in his mind. On page 23 of his brief he says:

"In the case of *Gila Valley, Globe & Northern Railway Company vs. Lyon*, 203 U. S. 465, it is held that where negligence of master in not supplying proper appliances has a share in causing

injuries to employee, the master is liable, notwithstanding the negligence of a fellow servant may have contributed to the accident.

"So that even if there had been in this case any positive proof of contributory negligence on the part of fellow employees or outsiders, and they had not put the cars in a proper position, or had left them improperly braked and blocked, or the cars had in any way been negligently started, and ran away, they could never have gotten on the main line, except in the absence of the simple device which it was the duty of the railroad company to furnish; and the failure of the railroad company to furnish this almost trifling equipment would have combined with the negligence of fellow employees or others in occasioning the accident. In such an event it, therefore, would have been a case of concurrent negligence, and would have been bound to go to the jury, same as it did do. It is universally held to be the law that in a case of concurrent negligence, the employer can be just as liable as if the negligence was that of his own entirely."

Choctaw O. & G. R. R. Co. vs. Holloway, 114 Fed. 458;

Voelker vs. Chicago, Milwaukee & St. Paul R. R. Co., 116 Fed. 67;

Mercantile Trust Company vs. Pittsburgh & W. R. R. Co., 115 Fed. 475;

Dailey vs. New York, N. H. and H. R. R. Co., 167 Fed. 592.

(C) *The fact as to whether or not the cars were left properly on the siding was directly in issue as a defense in the former suit and was directly decided therein so as to be res judicata.*

In the first action the defendant put forward two defenses (a) That derails were not in common use; and (b) That since the cars were left in a safe manner on the siding (due to brakes and blocks) the defend-

ant was not liable for not providing a second safeguard (to wit, a derail) and plaintiff could not recover. This second defense was the one more strongly relied upon both on the trial and on the appeal and a glance at the opinion of the Circuit Court of Appeals will show that it was absolutely necessary for it to decide this issue in reaching the conclusion it did reach (183 Fed. 375):

“The negligence charged against the defendant, and mainly relied upon by the plaintiff below, lay in the admitted fact that it had not provided the siding on which the cars were placed, with a derailing device whereby, had they been tampered with, or otherwise started, they would have been derailed before entering on the Pen Argyl branch. On the part of the defendant, however, it is urged that inasmuch as it had furnished cars equipped with efficient brakes and other appliances, and as it had left them standing on the siding braked and blocked in such manner that they could not possibly move out unless tampered with, it cannot be charged with negligence for not having in addition thereto, equipped the siding with a derailing device. The evidence in the case shows that the cars were equipped with brakes which were in good order and condition; that the first brake was ‘doubled,’ that is, the strength of two men was used in applying it; that the four rear cars were also strongly braked; that the wheels of the first two cars were blocked and that the cars remained securely on the siding for nearly twenty-four hours. Furthermore, all of the witnesses say that there was no way in which the cars could have been started or moved unless someone first loosened the brakes and removed the blocks. Indeed, the evidence, in behalf of the defendant, as to the braking and blocking, of the cars, was so strong and convincing that the learned judge below, in refusing a motion for a new trial, admitted that it might ‘be said to be conclusive that they (the cars) could not have run away except as the

result of some person loosening the brakes and removing the blocks, and as to how or by whom the brakes were loosened and the blocks removed, he admitted that there was no evidence. It appears that the case was allowed to go to the jury principally upon the theory that in addition to what the defendant actually did, it should have introduced a derailing device in the siding at some point before it joined the Pen Argyl branch. According to the evidence, however, the defendant had already done all that was necessary to make the cars not only reasonably but absolutely secure from running away. It was not obliged to anticipate and provide against the unlawful acts of marauders. Any theory, however, which might be adopted as to the cause of their starting, would be purely conjectural. There are no facts in the case from which the cause can be inferred. Under such circumstances it was error to allow the jury to speculate about the matter. . . .

"The defendant in this case, according to the uncontradicted testimony, secured the cars on the siding in question with, to say the least, reasonable care and safety, and in so doing, did all that under the law it was required to do. It was under no obligation to provide additional or cumulative devices. It is not required to insure against accident. Some stress, however, was laid upon the fact that the siding in question had a grade which descended towards the Pen Argyl branch; that circumstance, however, has no controlling weight, since, according to the testimony, the cars were securely and safely blocked at the place on the siding where they were left; the testimony therefore necessarily took into account the uneven grade of the siding at that place."

In the face of the foregoing quotations, from the opinion of the Circuit Court of Appeals in the former action, can it be said that the question of negligence of the Pen Argyl yard crew in not properly braking and blocking the cars is not a matter that is *res judi-*

cata, and will this court permit the entire matter to be tried again when once it has been gone into as thoroughly as it was?

Is it not perfectly clear that the reason given by the Circuit Court of Appeals for holding as they did that a derail was not necessary under the circumstances of the first case, was because the ash cars were properly braked and blocked and that there was no negligence on the part of defendant's yard crew in leaving the cars as they did leave them and, therefore, having provided one safe means of keeping the cars on the siding, the defendant was not obliged to install a derail there in addition.

How can it be maintained that the decision would have been the same if the evidence had shown that there was negligence in the manner of leaving the six ash cars on Albion Siding No. 2, when the court directly gives the reason for its decision to be the fact that there was no such negligence? And, therefore, how can one say that this point was not directly at issue and determined in the first case, when it was the defense put forward by this defendant as the reason why it was not liable to this plaintiff, and as such defense was sustained and upheld by the court? For example, suppose this plaintiff had sued in the first action under the Federal act for negligence in not properly blocking and braking the cars, and in that case the court had decided that it was not necessary for the defendant to block and brake the cars because a derail in perfect order had been provided. In the face of such a decision would this court then permit this plaintiff to sue under the Pennsylvania act alleging as the negligence the fact that no derail had been provided? And yet that is the exact converse of the position taken here. It is perfectly evident that the fact has once been judicially determined, in a case wherein it was directly in issue as a matter of defense

between these same parties and upon the same facts that the cars left upon Albion Siding No. 2, were properly braked and blocked and that that issue as between the same parties can never again be raised in any court.

Southern Pacific R. Co. vs. U. S., 168 U. S. 1, holds:

"A right question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and, *even if the second suit is for a different cause of action*, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In 23 Cyc., page 1215, the law is stated as follows:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction is conclusively settled by a judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

To sustain this statement of the law there are cases cited from every jurisdiction, including this court to the number of perhaps five hundred.

23 Cyc. 1216, states the law further, as follows:

"A former judgment between the same parties is a bar to the maintenance of the second action only when the cause of action in the two suits is identical. But it will be conclusive and final as to any issue litigated and determined in

the former suit, and coming again in question in the second suit, although the latter is brought upon an entirely different cause of action."

In the case of *Forsyth vs. Hammond*, 166 U. S. 506, Mr. Justice Brewer states the law as follows:

"The principles controlling the doctrine of *res judicata* have been so often announced and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." (Citing *Cromwell vs. County of Sac*, 94 U. S. 351, and other cases.)

To the same effect is the case of *MacDonald vs. Grand Trunk*, 59 L. R. A. 448 (cited ante), which case clearly states the law governing this contention of defendant in error.

Reference may also be had to the case of *Columb. vs. Webster Co.*, 84 Fed. 592, hereinbefore quoted from.

In his opinion refusing a new trial in the first case (180 Fed. 871) the learned trial judge said:

"The defense endeavors to avoid the charge of negligence by proving the manner of braking and blocking cars upon the siding, and urges that a conclusion must be drawn from this evidence that the cars could not have escaped except as a result of outside interference, and insists that such a conclusion is warranted and must be drawn by the court as a matter of law. The evidence relied upon does not justify a finding that 'outside parties tampered with the brakes and blocks.' The evidence of the defendant on this point, however, is a matter of defence to be submitted to the jury on the question of negligence. This evidence on the one side and on the other raises the

question of the defendant's negligence, a question of fact which was submitted to the jury under proper instructions."

The appellate court on the first appeal differed with the trial judge and held clearly that the evidence *was* conclusive, but the trial judge was clearly right in that case when he stated that the defense put in issue was the question as to whether or not the cars were securely braked. The appellate court held that the evidence was clear that they were securely braked and therefore a derail was not necessary.

But in the face of the foregoing quotation how can the plaintiff in error say in this case that the method of braking the cars was not in issue? Is it the law that only matters produced by the plaintiff become *res judicata*, and that a defense, put in at one trial, relied upon and finally sustained, is not *res judicata*? In the first case the plaintiff should have offered evidence to overcome this defense (which the court on appeal held to be a perfect one) and since she did not do so she cannot reopen the question.

D. FEDERAL EMPLOYER'S LIABILITY ACT NOT EXCLUSIVE IN CASE AT BAR.

Although this question may be more or less foreclosed by what was said in the *Second Employer's Liability Cases*, 223 U. S. 1, it is submitted that in this case the facts are entirely different and the Pennsylvania acts are not in conflict with the federal act.

The facts in this case were that Troxell was employed as a locomotive fireman upon the Bangor and Portland Railroad, which is entirely within the State of Pennsylvania. At the time of the collision with the ash cars, his locomotive was engaged in running between two points within the state of Pennsylvania. It is conceded that in the train which his locomotive was

hauling there were some cars destined to other states, but the others were consigned to points within the state of Pennsylvania.

Now does the mere fact that in his train are some cars destined to points without the state make Troxell such an employe engaged in interstate commerce as to exclude the applicability of the state acts when he was also engaged in intrastate commerce?

Troxell was not exclusively engaged in interstate commerce *but only incidentally*, and his employment was far more intrastate than interstate.

In *M. K. & T. Ry. Co. vs. Haber*, 169 U. S. 613, Mr. Justice Harlan, in enunciating the rule of *Sinnott vs. Davenport*, 22 How. 227, 243, said:

“A statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.”

There is absolutely no repugnance or conflict between the state act and the federal act.

The Pennsylvania acts (*supra*, page 65 of brief) allow a recovery for the identical persons covered by the Federal act and in the case at bar the species of negligence alleged to have been committed by the defendant in error, would have, if proved, allowed a recovery under either act. So where can there be any possible conflict or repugnance between the Federal and State acts?

It is submitted that where the railroad employe is practically exclusively engaged in intrastate commerce and only incidentally engaged in interstate commerce, he or the persons claiming through him should be allowed to elect under which act suit should be brought,

especially where there is no conflict between the two acts. And where an election has been made to sue under the state act, which allows as full and complete a remedy as the Federal act, for the benefit of the same parties, and the cause is tried upon its merits before the lower and appellate courts, it is submitted that the plaintiff has exhausted her remedies.

3. CASE NOT AT ISSUE.

It is with some reluctance that defendant in error again brings up this contention, as it did before both the trial and Circuit Court of Appeals, as the case has been such a source of expense to the litigants that it should be finally ended in this court by an affirmation upon the merits or the sustainment of the plea of *res judicata*.

The docket entries (Record, pages 1, 2 and 3) show that on January 14, 1911, defendant filed its pleas of "Not Guilty" and "*Res Judicata*"; that on January 19, 1911, the case was ordered on the trial list by the plaintiff; that on January 25, 1911, plaintiff filed a petition to strike off the plea of "*Res Judicata*"; that on February 6, 1911, defendant filed its answer to this petition; that on March 2, 1911, Judge Holland overruled the motion to strike off the plea of "*Res Judicata*," filing his opinion therewith; that on March 3, 1911, the court entered judgment for the defendant on plaintiff's motion to strike off the plea of "*Res judicata*," and that at that time an exception was granted to the plaintiff; that this judgment was appealed to the Circuit Court of Appeals, and that on April 13, 1911, the Circuit Court of Appeals dismissed the writ of error filed by plaintiff therein; that on June 7, 1911, the case was again ordered on the trial list; that on October 26, 1911, defendant filed a petition for rule to

show cause why the case should not be stricken from the trial list, which rule was discharged on October 27, 1911.

The case went to trial on November 13, 1911, without any further proceedings; in other words, the case went to trial with the defendant's plea of "*Res judicata*" on the record and not replied to.

It is defendant's contention that with the pleadings in this state, the case was not properly at issue and could not be tried. The learned trial judge had already decided, and properly so, that the plea of "*Res judicata*" was a correct plea under the practice and that he would not strike it off. This decision was affirmed on appeal. Thereupon the plaintiff had but one course which was possible in order to put the case at issue, and that course was to file a replication. Since the plaintiff did not file a replication, there was no issue joined and the case could not be tried. It does not in the least affect the case, in this aspect of it, that the trial judge decided at the time of the trial that the matter was not "*Res judicata*," because until there was an issue raised by the pleadings the case should not have gone to trial at all.

Rule 28 of the lower court, section 1, provides as follows:

"No cause shall be placed on the trial list *until after issue joined*, nor without the written order of one of the parties or his counsel on the trial order book, which shall be kept by the clerk for the purpose. Nor shall any cause be placed on the trial list for any term unless the same shall be *at issue* before the issuing of the venire for such term."

Amheim vs. Dye Works, 36 W. N. C. 32. Rule to restore case to trial list. The action was in trespass and the pleas were "not guilty" and "*res judicata*." With the pleadings in this state (identical to the case

at bar) the case was put upon the trial list and when called for trial was stricken off the list, on account of the pending of the special plea of *res judicata*. The plaintiff took a rule to restore the case to the trial list, upon the ground that the existence of the special plea did not prevent the case being at issue.

BREGY: "You should either file a replication or move to strike the plea off." The plaintiff's rule to restore the case to the list was discharged.

In the case at bar the plaintiff lost in the attempt to have defendant's special plea stricken off, and therefore a replication should have been filed before ordering the case upon the list, since otherwise the case is not at issue.

It is submitted that the following case rules the case at bar absolutely:

Daily vs. Iselin, 200 Pa. 200.

Assumpsit on a written contract. From the record it appeared that when the case was called for trial a plea in abatement which denied the legality of the service of the original summons was undisposed of. The plaintiff refused to file a replication, and the court thereupon entered the following order:

"Now, September 14, 1900, plaintiffs having refused to file replication as proposed, it is ordered, adjudged and decreed that the defendant's motion be and is hereby granted, the cause is continued and the case directed to be taken from the issue list. Exception noted for plaintiffs and bill sealed."

Mr. Justice Brown, in his opinion (201), says:

"A plea in abatement was filed by the defendant in the court below, raising the question of its jurisdiction over him. When the case was called for trial, after having been continued three times, the court's attention was called to this plea, and

the very proper suggestion made that it must first be disposed of. Plaintiffs had not joined issue on it; nor moved to strike it off; but, for reasons which need not be here stated, for they cannot be now considered, urged the court to ignore it and to irregularly order the trial to proceed with this undisposed of plea on the record. The reasons given for asking the court to disregard it would have been considered below and reviewed here on an appeal from a final judgment, if the plaintiffs had taken proper steps to dispose of it; but having failed to do so, and having neglected and refused to file a replication, when permitted as the jury was about to be called, there was nothing for the court to do, in the face of their default, or what may not be unfairly termed their perversity, but to order the case continued and to direct that it remain off the issue list, to which it can be restored whenever the plaintiffs see fit to proceed regularly to dispose of the plea in abatement. The order of the court was clearly interlocutory, made necessary by the conduct of the plaintiffs, preventing a final judgment on an appeal from which any alleged error committed at stage of the proceedings can be reviewed. No appeal lies from such an order, and it is quashed."

There are numerous cases deciding that the act of 1887 did not affect pleas in abatement.

31 Cyc., page 128, says:

"Statutes abolishing special pleading apply only to pleas in bar, and pleas in abatement may still be filed." (Citing Pa. case.)

16 P. & L. Dig. of Decis. col. 27, 403, says:

"Procedure Act of 1887 did not affect pleas in abatement."

and under this there are cited numerous cases.

See also *International Co. vs. Penna. Co.*,
15 D. R. (Pa.) 225.

The plea of *res judicata* may be pleaded as a plea in abatement and therefore is not affected by the act of 1887.

See P. & L. Dig. of Dec. Vol. 16 col. 27,407, where are cited:

Singer Co. vs. Yaduskie, 26 Pa. C. C. 298;
Rudolps vs. Sturgis, 25 Pa. C. C. 577.

Where a plea in abatement has been properly filed it must be replied to before there is an issue, and until there is an issue it cannot be put upon the trial list.

Daly vs. Iselin, 10 D. R. 193.

Defendant in error submits that the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed on both the merits and that the judgment in the former action is *res judicata* of the present action.

Respectfully submitted,

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